The National Collegiate Athletic Association's No Agent And No Draft Rules: The Realities Of Collegiate Sports Are Forcing Change

I. INTRODUCTION

The National Collegiate Athletic Association (NCAA) is a voluntary association of over 1000 members comprised of colleges, universities, conferences, and associations.[1] Such expansive member-

1. Banks v. NCAA, 746 F. Supp. 850, 852 (N.D. Ind. 1990) (*Banks I*). As detailed *infra* at note 138, plaintiff Banks filed an amended complaint following *Banks I* which resulted in a memorandum opinion and a subsequent appeal, Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1350 (1993) (*Banks II*). Judge Flaum concurred in part and

ship effectively makes the NCAA the most powerful association in intercollegiate athletics.[2] There is no question that NCAA accomplishments in intercollegiate athletics are often beneficial to its members, coaches, student-athletes, sports fans, and society in general.[3] With the success and popularity of many intercollegiate sports, the NCAA has become entrusted with managing a huge revenue generating industry.[4] Together with managing the high

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dissented in part in this decision. *Id.* at 1094. Because the thrust of Judge Flaum's theories discussed herein disagree with the majority opinion, this comment will refer to Judge Flaum's opinion as a "dissent."

For ease of reference, the following acronyms will be used throughout this Comment: National Collegiate Athletic Association (NCAA); Amateur Athletic Union (AAU); National Association for Intercollegiate Athletics (NAIA); University of Nevada, Las Vegas (UNLV); Southern Methodist University (SMU); National Football League (NFL); Canadian Football League (CFL); World League of American Football (WLAF); National Basketball Association (NBA); National Hockey League (NHL); Major League Baseball (MLB); American Broadcasting Company (ABC); and Columbia Broadcasting System (CBS).

2. James V Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L. REV. 9, 11-12 (1985). The NCAA's competition in big-time amateur athletics is minimal at best. *See id.* at 12. The AAU and NAIA are the only remaining rivals of the NCAA. *Id. See also Banks I*, 746 F. Supp. at 852 (stating that the NCAA is the most dominant association in intercollegiate athletics).

3. *See Banks II*, 977 F.2d at 1099 (Flaum, J., concurring in part and dissenting in part). The success and popularity of collegiate athletics allow the sport fan to enjoy the high drama of competition while student-athletes get the many benefits of competition including character development and leadership abilities. *Id. See also* Rodney K. Smith, *An Academic Game Plan for Reforming Big-Time Intercollegiate Athletics*, 67 DEN. UNIV. L. REV. 213, 221-22 (1990) (discussing the benefits of big-time collegiate athletics to the student-athlete vis-à-vis character development and to the student population as a whole vis-à-vis a close knit sense of community). The success of the NCAA has helped support the opportunity for student-athletes to participate in a wide variety of sports even if that particular sport produces little income or even loses income. John Scanlan, *Introduction: Antitrust — The Emerging Legal Issue*, 61 IND. L. REV. 1, 2 (1985); Smith, *supra*, at 226 (stating that revenues from big-time collegiate sports are used to fund nonrevenue generating sports programs and are used in other, nonathletic departments of the university).

4. Gaines v. NCAA, 746 F. Supp. 738, 743 (M.D. Tenn. 1990) (citing Hennessey v. NCAA, 564 F.2d 1136, 1149 n.14 (5th Cir. 1977)). The court in *Hennessey* stated in pertinent part:

> While organized as a non-profit organization, the NCAA — and its member institutions — are, when presenting amateur athletics to a ticket-paying, television-buying public, engaged in a business venture of far greater magnitude than the vast majority of "profit-making" enterprises. The NCAA has a multi-million dollar annual budget; and it negotiates and administers for itself or its members television contracts exceeding, for all sports, over $20,000,000 a year. The University of Alabama, just one of its members, has an athletic program which involves millions of dollars annually, and which has over the years, produced significant "profits" for use by non-athletic activities of the institution.

Hennessey v. NCAA, 564 F.2d 1136, 1149 n.14 (5th Cir. 1977). *See also* Koch, *supra* note 2, at 14; Barry W. Ponticello, *"Over"due Process: The Saga of the NCAA, Its Members and Their*

financial stakes, the NCAA has, over time, become the primary stepping stone to several professional athletic markets.[5] Due to the high visibility it receives, the NCAA is constantly under public scrutiny because many of its rules and regulations ultimately affect the coaches[6] and students[7] who are not members of the NCAA.[8]

There are several basic self-proclaimed purposes of the NCAA which include: (1) maintaining the distinction between intercollegiate athletics and professional sports (the amateurism component);[9] (2) conducting athletics programs to benefit the student-

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Representatives, 20 LINCOLN L. REV. 43, 45 (1991) (stating that the NCAA acts as a business agent for its members); Smith, *supra* note 3, at 215, 215 n.15 (noting the fact that the NCAA signed a $1 billion television contract for basketball and that in 1988, 104 Division 1-A institutions generated more than $500 million in revenue from their collegiate football programs); Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1214 n.8 (1993).

5. Ethan Lock, *Unreasonable NCAA Eligibility Rules Send Braxston Truckin'*, 20 CAP. U. L. REV. 643, 653 (1991). As opposed to MLB which finances its own minor league system, the NFL relies on collegiate football to be the equivalent of a minor league. *Id.* In fact every one of the 222 draft choices in the 1994 NFL draft was associated with a collegiate football program. USA TODAY, Apr. 26, 1994, at C10.

6. *See generally* NCAA v. Tarkanian, 488 U.S. 179 (1988). The NCAA requested UNLV, a member of the NCAA, to sever ties with its basketball coach, Jerry Tarkanian, after he was cited for being involved in ten violations of NCAA rules. *Id.* at 181. The NCAA may order a member institution to take action against a coach who is not a member of the NCAA. *Id.* at 183-84 nn.6-7. The NCAA cannot act directly against the nonmember coach who has allegedly violated the NCAA bylaws. *Id.* at 184. If the NCAA member does not impose the NCAA recommended discipline on the coach, the institution will suffer further sanctions. *Id.*

UNLV was sanctioned with a two year probation whereby the UNLV men's basketball team could not participate in postseason tournaments or be televised. *Id.* at 186. UNLV would have faced stiffer sanctions if it did not attempt to sever Coach Tarkanian from the athletic program at UNLV during the probation period. *Id.* For a complete discussion of the *Tarkanian* case see, Kevin M. McKenna, *Courts Leave Legislatures to Decide the Fate of the NCAA in Providing Due Process*, 2 SETON HALL J. SPORT L. 77, 90-96 (1992).

7. *See, e.g.*, *Gaines*, 746 F. Supp. at 740. The NCAA regulations rendered the student-athlete, Bradford Gaines, ineligible to complete in his final season of collegiate football. For a full discussion of the *Gaines* case, see *infra* part III.B.

8. Ponticello, *supra* note 4, at 44; Smith, *supra* note 3, at 223. Lack of membership in the NCAA can have dramatic impact. Banks v. NCAA, 977 F.2d 1081, 1084 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1350 (1993). Braxston Banks made a personal request to the NCAA to have his eligibility to play football at Notre Dame restored. *Id.* The NCAA did not consider Banks's request because he lacked membership. *Id.* Notre Dame, an NCAA member, did not petition the NCAA for restoration of Banks's eligibility because no college or university had made such a request following a student-athlete's entry in the NFL draft. *Id.*

9. NCAA CONSTITUTION art 1.3.1, *reprinted in* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1994-95 NCAA MANUAL (Laura Bollig, ed., 1994) [hereinafter NCAA CONSTITUTION]. The basic purpose of the NCAA "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional

athletes' educational welfare and maintain athletics as a vital part, although subordinated to, the student-athlete's education (the educational component);[10] (3) promoting competitive equity between NCAA institutions (the procompetitive component);[11] and (4) promoting the financial and economic well-being of the NCAA members (the financial or economic component).[12] In order to advance its purposes, the NCAA has instituted various eligibility rules.[13] Certain eligibility rules, including the rules proscribing the use of agents (the "no agent" rule),[14] and the rules regarding player drafts (the "no draft" rule),[15] were instituted to insure that student-athletes are in fact amateurs.[16] Basically, the no agent rule prevents the student-athlete from agreeing to be represented by an agent.[17] The no draft rule prevents the student-athlete from voluntarily entering a professional draft.[18] The arguments have been made that the no agent and no draft bylaws (1) restrain trade in violation of the Sherman Act[19] and (2) are part of the illegal exercise of monopoly power in violation of the Sherman Act.[20]

Cases which have evaluated whether NCAA conduct violates antitrust law generally follow one of two lines of reasoning. The first states that the NCAA is not subject to antitrust attack, espe-

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sports." *Id. See also id.* art. 2.8 (discussing the principle of amateurism).

10. *Id.* arts. 1.3.1, 2.2 (discussing the principle of student-athlete welfare), 2.5 (discussing the "principle of sound academic standards").

11. *Id.* arts. 2.10, 2.11 (both noting the goal of promoting equity among NCAA member institutions).

12. *Id.* art. 2.15 (discussing the "economy of athletics program operation"); Justice v. NCAA, 577 F. Supp. 356, 383 (D. Ariz. 1983).

13. NCAA OPERATING BYLAWS art. 12, *reprinted in* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1994-95 NCAA MANUAL (Laura Bollig ed., 1994) [hereinafter NCAA BYLAWS]. Article 12 is devoted to amateurism. *Id.* In order to participate in intercollegiate athletics the student-athlete must be an amateur as defined by the NCAA. *Id.* art. 12.01.1.

14. *See id.* art. 12.3. The student-athlete who agrees to be represented by an agent is rendered ineligible to compete in an NCAA event. *Id.* For the complete text of the no agent rule, see *infra* note 101.

15. *See id.* art. 12.2.4. In substance, barring exceptions, *see id.* art. 12.2.4.2.1, a student-athlete will lose his or her eligibility if they voluntarily enter a professional league draft. *Id.* art. 12.2.4.2. For the complete text of the no draft rule, see *infra* note 102.

16. *Id.* art. 12.1 (stating that a student-athlete must comply with the eligibility bylaws to be deemed an amateur).

17. NCAA BYLAWS, *supra* note 13, art. 12.3.

18. *Id.* art. 12.2.4.

19. Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1350 (1993); Banks v. NCAA, 746 F. Supp. 850 (N.D. Ind. 1990).

20. Gaines v. NCAA, 746 F. Supp. 738, 741 (M.D. Tenn. 1990). *See also* Chin, *supra* note 4, at 1228.

cially when setting eligibility standards because collegiate, noncommercial activity is not the type of action subject to antitrust regulation.[21] Notwithstanding this threshold finding, the courts, in a hypothetical analysis, generally have reasoned that even if the NCAA was subject to antitrust law, the setting of eligibility standards does not violate antitrust law [22]

The second line of reasoning courts have followed is that the NCAA is subject to antitrust review when setting eligibility rules, but that the NCAA has not violated the antitrust laws.[23] This second group of cases has generally reasoned that the NCAA eligibility rules do not violate antitrust law because the rules are necessary for the promotion of the NCAA's purposes and any resulting anticompetitive effects are incidental to the promotion of intercollegiate sports together with its unique characteristics including amateur players.[24]

This Comment argues that, with respect to football, the no agent and no draft rules violate the Sherman Antitrust Act (Sherman Act). In reaching this conclusion, this Comment makes three underlying arguments. First, the NCAA's setting of eligibility bylaws is subject to antitrust review. Second, there is a football player market that is restrained due to the no agent and no draft rules. Third, the no agent and no draft rules do not further the NCAA's legitimate purposes, and therefore any procompetitive effect of the rules does not outweigh the anticompetitive effect of the rules.

Part II of this Comment provides a brief overview of antitrust law, particularly the Sherman Act which has been the main focus of challenges to the NCAA eligibility rules. Part III traces the antitrust attacks against the NCAA eligibility rules including the no agent and no draft rules.[25] Part IV develops the faults in the courts' reasoning with respect to the antitrust analysis of the no agent and no draft rules as they are applied in intercollegiate foot-

21. *Gaines*, 746 F Supp. at 743; Jones v. NCAA, 392 F. Supp. 295, 303 (D. Mass. 1975).
22. *Gaines*, 746 F. Supp. at 747; *Jones*, 392 F. Supp. at 303-04.
23. *Banks I*, 746 F. Supp. at 857, 862.
24. *Id.* at 862.
25. The NCAA publishes the history of certain high profile bylaws. For example, the NCAA published the history of Bylaw 5-1-(j), now contained in article 14.3 of the NCAA bylaws, and more commonly known as Proposition 48. Unfortunately the NCAA has not published a historical background on either the no agent or no draft rule. Telephone Interview with NCAA Employee, NCAA Legislative Services (Feb. 1994).

ball. The Comment concludes by stating that antitrust challenges to the no agent and no draft rules as applied to football should be successful in a court that refuses to act on antiquated reasoning and does not take NCAA purposes at face value. The conclusion also sets forth what the no agent and no draft rules should accomplish in substance without restricting trade. Finally, the conclusion sets forth a prediction on the future of the no agent and no draft rules.

II. ANTITRUST OVERVIEW

One of the main types of attack against NCAA regulations has come in the form of antitrust challenges.[26] This Comment traces the evolution of antitrust law only as it has been applied to the NCAA eligibility rules.[27] A certain understanding of general antitrust law, however, is required to follow the concepts contained in this comment.

Section 1 of the Sherman Act generally prohibits any means of restraining trade or commerce.[28] Section 2 of the Sherman Act specifically prohibits monopolies.[29] Notwithstanding the actual language of the Sherman Act, "every" combination which restrains trade is not a violation of the Sherman Act.[30] Rather, combinations or agreements have to be evaluated under a reasonableness analysis and only "contracts and combinations which amount to an unreasonable or undue restraint of trade" are prohibited.[31] This type

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26. *See* Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1350 (1993); Gaines v. NCAA, 746 F. Supp. 738, 741 (M.D. Tenn. 1990); Banks v. NCAA, 746 F. Supp. 850, 857 (N.D. Ind. 1990); McCormack v. NCAA, 845 F.2d 1338, 1340 (5th Cir. 1988); Justice v. NCAA, 577 F. Supp. 356, 375 (D. Ariz. 1983); Jones v. NCAA, 392 F. Supp. 295, 296 (D. Mass. 1975). For a full discussion of these cases, see *infra* part III.

27. For a full review of antitrust law, see generally PHILLIP AREEDA AND DONALD F. TURNER, ANTITRUST LAW (1978).

28. 15 U.S.C. § 1 (Supp. IV 1992). The Sherman Act provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.*

29. 15 U.S.C. § 2 (Supp. IV 1992). Section 2 of the Sherman Act provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony "

30. *E.g.*, Denver Rockets v. All-Pro Management, Inc., 325 F Supp. 1049, 1062-63 (C.D. Cal. 1971) (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911)).

31. *Id.* at 1063.

of analysis is commonly referred to as the "rule of reason."[32]

Due to the nebulous, fact specific analysis required under the rule of reason, certain practices have been deemed to be presumptively unreasonable and, therefore per se violations of the Sherman Act.[33] Group boycotts — a concerted effort by a group of competitors whose "purpose [is] to exclude a person or group from the market or accomplish some other anti-competitive objective"[34] — is an example of conduct that is per se illegal under the Sherman Act.[35] Within specific circumstances set forth in *Denver Rockets v. All-Pro Management, Inc.*, however, a group boycott, generally a per se antitrust violation, is analyzed under the rule of reason.[36] A Sports league or association, whose rules and regulations could constitute a group boycott, is one of the specific circumstances generally viewed under a rule of reason analysis.[37] Consistent with this, courts that have reviewed the NCAA eligibility rules under antitrust law have rejected the argument that the rules constitute a per se group boycott violation.[38] The courts instead have decided the cases according to the rule of reason.[39]

It is also important to note that antitrust laws are applicable to

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32. *Id.*

33. *Id.*

34. Jones v. NCAA, 392 F. Supp. 295, 304 (D. Mass. 1975).

35. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1063-64 (C.D. Cal. 1971). *See also* Justice v. NCAA, 577 F. Supp. 356, 379 (D. Ariz. 1983). Activities which are deemed per se illegal include group boycotts, Fashion Originators' Guild of Am., Inc. v. Federal Trade Comm'n, 312 U.S. 457 (1941); pricing fixing, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210 (1940); division of markets, United States v. Addyston Pipe & Steel Co., 85 F. 271 (1898), *aff'd*, 175 U.S. 211 (1899); and tying arrangements, International Salt Co., Inc. v. United States, 332 U.S. 392 (1947). *Denver Rockets*, 325 F. Supp. at 1063 (citing Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1957)).

36. *Denver Rockets*, 325 F. Supp. at 1064-65. In order for a group boycott to gain the benefit of a rule of reason analysis, three prerequisites must be shown:

> (1) There is a legislative mandate for self-regulation .. [or] collective action is required by the industry structure
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> (2) The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary.
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> (3) The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review.

Id. (citation omitted).

37. *Justice*, 577 F. Supp. at 380; *Denver Rockets*, 325 F. Supp. at 1064-66.

38. *E.g., Justice*, 577 F. Supp. at 379.

39. Some courts, *see, e.g., Jones*, 392 F. Supp. at 295, only turned to the rule of reason in a hypothetical analysis. *Id.* at 303. These courts, as a threshold issue, held in a blanket fashion that antitrust law was not meant to reach NCAA eligibility rules. *Id.*

the situation where two or more employers collude to effectuate a restraint on a labor market.[40] Thus, while the antitrust laws commonly protect consumers from the collusion of producers and the resulting higher prices, the laws also protect labor from collusion by employers to the former's detriment.[41]

Two cases, which are reviewed in this comment, have held that antitrust law is not applicable to NCAA eligibility rules due to a lack of commercial or business nature inherent in the rules.[42] Other cases, also reviewed herein, have held that the NCAA eligibility rules are reviewable under antitrust law.[43] Under the rule of reason, however, courts in the second group have held that the eligibility rules do not violate antitrust law.[44]

III. NCAA ELIGIBILITY RULES AND THE SHERMAN ANTITRUST ATTACKS

A. Challenges to the Eligibility Rules in General

Jones v. NCAA[45] addressed the fundamental question of whether the Sherman Act covers the NCAA in setting eligibility standards.[46] The court in *Jones* held that the Sherman Act did not reach the NCAA eligibility bylaws.[47]

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40. Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332, 335-36 (7th Cir. 1967).

41. *Id.* The *Nichols v. Spencer International Press* case stated:

> Granting that the antitrust laws were not enacted for the purpose of preserving freedom in the labor market, nor of regulating employment practices as such, nevertheless it seems clear that agreements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also, depending upon the circumstances, impair full and free competition in the supply of a service or commodity to the public.

Id.

42. Jones v. NCAA, 392 F. Supp. 295, 303 (D. Mass. 1975).

43. Banks v. NCAA, 746 F. Supp. 850, 857 (N.D. Ind. 1990).

44. *See, e.g., id.* at 862.

45. 392 F. Supp. 295 (D. Mass. 1975).

46. *Id.* at 303. Plaintiff, Steven Jones, was a Northeastern University hockey player. *Id.* at 296. Jones sought to enjoin the NCAA and university personnel from rendering him ineligible to play hockey. *Id.* Jones's eligibility problems stemmed from payments he had received while playing for amateur hockey teams. *Id.* at 297. This apparent compensation occurred while Jones was in high school and during a two year period following high school, but prior to attending Northeastern. *Id.* The first count alleged a denial of due process and equal protection. *Id.* at 296. In the second count of the complaint, the plaintiff alleged violations of the Sherman Act. *Id.* Jones claimed that the NCAA eligibility rules in question were violative of both sections 1 and 2 of the Sherman Act. *Id.* For the text of §§ 1 and 2 of the Sherman Act, see *supra* notes 28-29.

47. *Jones*, 392 F. Supp. at 303.

The *Jones* court first observed that not every form of combination or conspiracy alleged to restrain trade was intended to be covered by the Sherman Act.[48] The Sherman Act, according to *Jones* was directed at big business and combinations involving commercial objectives.[49] In essence, the court in *Jones* perceived that the goal of the Sherman Act was to prevent the monopolistic tendency of big commercial business in suppressing competition.[50] The *Jones* case observed no nexus between business or commercial activities in the traditional sense and the NCAA eligibility standards.[51]

Within this framework, the court in *Jones* determined that the plaintiff's attempted application of the Sherman Act was inappropriate.[52] The court reasoned that a student-athlete is not a competitor of the NCAA in any type of business sense.[53] The court further reasoned that the competition involved was related to a sports program at an educational institution, and thus not part of the business marketplace or economy.[54]

The *Jones* decision, however, by way of dictum, did evaluate a hypothetical assuming the NCAA was within the ambit of the Sherman Act.[55] The court observed that the plaintiff's primary argument in support of an antitrust violation was that NCAA action denying plaintiff access to play intercollegiate hockey was equiva-

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48. *Id.* (citing Apex Hosiery v. Leader, 310 U.S. 469, 492-93 (1948); Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911); Marjorie Webster Jr. College v. Middle States Ass'n of Colleges & Secondary Schs., 432 F.2d 650, 653 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970)).

49. *Id.* (citing Apex Hosiery v. Leader, 310 U.S. 469, 492-93 (1940)). *Apex Hosiery* stated:

> [The Sherman Act] was enacted in an era of "trusts" and of "combinations" of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern.

Apex Hosiery v. Leader, 310 U.S. 469, 492-93 (1948), *quoted in Jones*, 392 F. Supp. at 303.

50. *Jones*, 392 F. Supp. at 303.

51. *Id.*

52. *Id.* The *Jones* case observed that "[t]he proscriptions of the [Sherman] Act were 'tailored for the business world,' not as a mechanism for the resolution of controversies in the liberal arts or in the learned professions." *Id.* (quoting Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)).

53. *Id. But see infra* part IV.B. (discussing possible collusion between the NCAA and NFL). This rather brief look by the *Jones* court at the relationship between the NCAA and the student-athlete is indicative of the more evolved market analysis that took place in the later decisions. *See infra* part III.B., IV.B. (discussing and attempting to define the market relationship that exists between the NFL, NCAA, and student-athlete).

54. *Jones*, 392 F. Supp. at 303. *But see infra* part IV.A. (discussing the commercial nature of the NCAA).

55. *Jones*, 392 F. Supp. at 303-04.

lent to a group boycott argument.[56] The court in *Jones* opined that Jones would not likely be able to establish that the NCAA intentionally sought to bar student-athletes from intercollegiate hockey.[57] The court found any resulting limitation of access to intercollegiate sports was incidental to the NCAA's legitimate purpose of promoting amateurism in collegiate sports.[58] Therefore, the NCAA's conduct did not violate section 1 of the Sherman Act even if the Act was applicable.[59] The court also rejected out of hand the plaintiff's argument that the NCAA had created the eligibility standards for the purpose of forming a monopoly in violation of section 2 of the Sherman Act.[60]

The *Jones* case set forth three important lines of reasoning. With respect to its holding that the Sherman Act was inappropriate to challenge the NCAA eligibility rules, the court in *Jones* reasoned (1) that the NCAA actions with respect to eligibility standards are not commercial or business-like within the context of the Sherman Act[61] and (2) the student-athlete is not a competitor of the NCAA.[62] Third, under the hypothetical that the Sherman Act was applicable, the court in *Jones* reasoned that any limitation of access experienced by the prospective student-athlete as a result of the eligibility rules is purely incidental to the NCAA's legitimate purpose of promoting amateurism.[63]

In *Justice v. NCAA*[64] the United States District Court for the District of Arizona considered whether certain NCAA sanctions were a restraint of trade under section 1 of the Sherman Act.[65]

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56. *Id.* If a group boycott had occurred this would be a per se violation under § 1 of the Sherman Act. *Id.* at 304. *See* Klor's v. Broadway - Hale Stores, Inc., 359 U.S. 207, 211-12 (1958). *See also supra* part II. In order to establish a group boycott claim, Jones would have had to show that the NCAA's intentional purpose was to exclude a person or group from the market of eligible collegiate hockey players. *Jones*, 392 F. Supp. at 304.

57. *Jones*, 392 F. Supp. at 304.

58. *Id. But see infra* part IV.C. (setting forth the argument that the no agent and no draft rules do not further the purpose of preservation of amateurism in collegiate football).

59. *Jones*, 392 F. Supp. at 304. *See also supra* note 36 and text accompanying notes 35-39 (discussing the fact that not all group boycotts are illegal, especially in the sports league type of situation where certain rules and regulations must be in place).

60. *Jones*, 392 F. Supp. at 304.

61. *Id.* at 303.

62. *Id.* at 304.

63. *Id.*

64. 577 F. Supp. 356 (D. Ariz. 1983).

65. *Id.* at 375. NCAA sanctions instituted against the University of Arizona football team included a two year prohibition from postseason play and a two year prohibition from being televised. *Id.* at 360. The sanctions were imposed following an NCAA investigation

The plaintiffs alleged that the vote by members of the NCAA to sanction Arizona, also a member of the NCAA, constituted an agreement by Arizona's competition to exclude them from television coverage and postseason play.[66] After addressing the standing issue[67] the *Justice* opinion rejected the NCAA's claim that its imposition of sanctions on the University of Arizona was not a restraint of commerce or trade.[68] The court in *Justice* reasoned that the interstate nature of the NCAA and huge amount of revenue involved in NCAA televised events warranted the application of antitrust law.[69] With this holding, the *Justice* court contradicted the reasoning of the *Jones* case which held that NCAA eligibility rules were not commercial in nature.[70]

The court in *Justice* then found that the NCAA sanctions did not constitute a per se group boycott under the Sherman Act primarily for two reasons.[71] First, the court reasoned that the NCAA sanctions were not imposed for the purpose of curtailing competition.[72] Rather, the court found that the regulations in question

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which found numerous violations of NCAA rules from 1975 through 1979. *Id.* at 362. The conduct cited in the NCAA Infraction Committee report included compensation and extra benefits being provided to football players by coaches and others associated with the football program. *Id.* The plaintiffs, four players on the University of Arizona football team, also set forth several constitutional claims including a right to be free from punishment without guilt, a right to their property interest in playing postseason football and being televised, and a right to pursue their chosen vocation. *See id.* at 361-63.

66. *Id* at 375. The Members of the NCAA which voted to sanction the University of Arizona comprised the Committee on Infractions. *Id.* at 362. The Committee on Infractions is now made up of "eight members, six of whom shall be at present or previously on the staff of an active member institution or member conference of the [NCAA], [and] two of whom shall be from the general public." NCAA BYLAWS, *supra* note 13, art. 19.1.1.

67. The court in *Justice* noted that the case could have been disposed for a lack of standing because the plaintiffs claimed injury was too remote and attenuated. *Justice*, 577 F. Supp. at 378. Notwithstanding, the court refused to dismiss the case solely based on standing and chose to reach the merits of the plaintiffs' antitrust claim. *Id.*

68. *Id.*

69. *Id.*

70. *See supra* text accompanying note 61. While the language of the *Justice* case spoke to a challenge of "NCAA sanctions," the core of the sanctions was based on eligibility rules violations. *Justice*, 577 F. Supp. at 362 (discussing the cash payments to students).

71. *Justice*, 577 F. Supp. at 379. Unlike the *Jones* case, *see supra* text accompanying notes 45 - 63, the *Justice* case did not make the threshold determination that the Sherman Act was inapplicable to NCAA eligibility rules. *Justice*, 577 F. Supp. at 379. Rather, the *Justice* court evaluated whether the NCAA restraint was reasonable, i.e., a rule of reason analysis was applicable. *Id.*

72. *Justice*, 577 F. Supp. at 379-80. The court stated that "[i]n situations involving concerted action, the pertinent inquiry is whether the refusal to deal is so anticompetitive in purpose or effect as to be an unreasonably [sic] restraint of trade." *Id.* at 379.

were solely for the purpose of accomplishing the NCAA's goal of maintaining amateurism.[73] The court also found that the regulations at issue enhanced fair competition between NCAA members and did not constitute a typical agreement between business competitors to restrain trade.[74]

Second, the court in *Justice* recognized case law that provides an exception for athletic organizations from group boycott treatment.[75] The *Justice* court followed the three-prong test set forth in *Denver Rockets v. All-Pro Management, Inc.*[76] to determine whether the rule of reason, rather than a per se group boycott rule, was applicable.[77] The court found the NCAA regulations at issue passed the *Denver Rockets* three-part test and that, therefore, a rule of reason analysis was warranted.[78] Specifically, the *Justice* court determined that there were no less restrictive means for the NCAA to utilize in regulating its athletic programs.[79] Furthermore, the court declared that the NCAA sanctions in question were "reasonably related to the legitimate goals of preserving amateurism and promoting fair competition in intercollegiate athletics."[80]

Once the *Justice* court clarified that the rule of reason was applicable, the court held that the NCAA sanctions were not an unreasonable restraint within the meaning of the Sherman Act.[81] The court repeated that the sanctions were primarily for the preservation and promotion of amateurism rather than to promote an anticompetitive purpose.[82] Also, the *Justice* case stated that the NCAA sanctions were reasonably related to NCAA goals and were

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73. *Id.*
74. *Id.*
75. *Id.* at 380 (citing Silver v. New York Stock Exch., 373 U.S. 341 (1963)). The *Justice* court described a trend at the time not to subject the regulations of sports organizations to per se group boycott analysis. *Id.* The court observed that this reasoning was based on the theory that in order for the sport to survive a few rules are necessary. *Id.* The court noted that the rule of reason is applied to industries where self-regulation is necessary and that amateur sports organizations fit into this category. *Id. See also* Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971).
76. 325 F. Supp. 1049 (C.D. Cal. 1971).
77. *Justice*, 577 F. Supp. at 380-81. *See supra* note 36 for the substance of the three-prong *Denver Rockets* test.
78. *Justice*, 577 F. Supp. at 381-82.
79. *Id.* at 381.
80. *Id.* at 382.
81. *Id.* at 383.
82. *Id.* at 382-83.

not overbroad in that respect.[83]

Four reasons can be distilled from the *Justice* opinion with respect to why the NCAA sanctions, which enforce the eligibility rules, do not violate antitrust law: (1) the primary purpose of the rules is to maintain amateurism;[84] (2) the rules promote fair competition;[85] (3) the NCAA sanctions are not a typical agreement between business competitors to restrain trade;[86] and (4) the sanctions are not overbroad, but are related to NCAA goals.[87]

In *McCormack v. NCAA*,[88] the United States Court of Appeals for the Fifth Circuit had the opportunity to evaluate an antitrust challenge of NCAA rules that limit compensation to student-athletes.[89] Similar to the *Jones* and *Justice* cases, the court in *McCormack* discussed whether the NCAA eligibility rules were subject to antitrust analysis.[90] Unlike *Jones* (the antitrust laws are not applicable) and *Justice* (the antitrust laws are applicable), the *McCormack* opinion did not reach a definitive resolution of the issue, choosing instead to dispose of the case assuming *arguendo* that the Sherman Act was applicable.[91]

The court undertook a rule of reason analysis.[92] The

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83. *Id.* at 383.

84. *Id.* at 379, 382-83.

85. *Id.* at 379.

86. *Id.*

87. *Id.* at 383. The *Justice* court differentiated two goals of the NCAA: (1) the protection of amateurism and (2) the promotion of the economic interests of NCAA members. *Id.* These goals inherently conflict, however, because in order to protect its economic interests, the NCAA must be commercialized and exploit its "amateur" student-athletes. *See* Smith *supra* note 3, at 215. *See also* Chin, *supra* note 4, at 1216-19 (discussing how the NCAA role as protector of academic integrity conflicts with its economic function).

88. 845 F.2d 1338 (5th Cir. 1988).

89. *Id.* at 1340. The NCAA suspended SMU's football program, having found violations of NCAA bylaws restricting the compensation of student-athletes. *Id.* The plaintiffs alleged that the NCAA rules restricting compensation of student-athletes equates to illegal price fixing — a per se violation of the Sherman Act. *Id. See also supra* note 35. The plaintiffs also argued that the resulting suspension for illegal compensation constituted a group boycott under the Sherman Act — also a per se violation. *McCormack*, 845 F.2d at 1340. *See also supra* note 35. The plaintiffs sought $170 million in damages under antitrust law. *McCormack*, 845 F.2d at 1340.

The *McCormack* opinion also discussed whether the SMU football players had standing to present their antitrust challenges. *Id.* at 1342-43. Without resolving the issue, the court assumed valid standing. *Id.* at 1343.

90. *McCormack*, 845 F.2d at 1343.

91. *Id.*

92. *Id.* at 1343-45. The *McCormack* court acknowledged that price fixing generally is deemed per se illegal. *Id.* at 1343 n.25. The court noted, however, that in certain areas such

McCormack court held that the eligibility rules were reasonable, and therefore did not violate the Sherman Act.[93] The *McCormack* court reasoned that the NCAA eligibility rules preserved the amateurism and educational components of collegiate football.[94] The amateurism and educational components of collegiate football distinguished the sport from professional football, according to the *McCormack* opinion.[95] In this respect, the *McCormack* court found that the NCAA eligibility rules with respect to compensation were procompetitive because without the amateurism and educational components, collegiate football might perish due to a lack of distinction from professional football.[96]

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as college football, certain rules and restrictions are necessary for competition to occur at all. *Id.* at 1344 (citing NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984)). Because anticompetitiveness is not the intent of these rules, a rule of reason analysis was applicable. *Id.* The *Board of Regents* case dealt primarily with whether the NCAA had restrained trade in its television contract with CBS and ABC — a clearly commercial NCAA action. NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 92, 119 (1984). *See also* Chin, *supra* note 4, at 1228. The *Board of Regents* opinion, however, contained significant dicta speaking to the NCAA eligibility rules which the NCAA has argued are noncommercial. *E.g.*, *McCormack*, 845 F.2d at 1343. The Court in *Board of Regents* stated:

> What the NCAA and its member institutions market in this case is competition itself — contests between competing institutions. Of course this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover the NCAA seeks to market a particular brand of football — college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice — not only the choices available to sports fans but also those available to athletes — and hence can be viewed as procompetitive.

Board of Regents, 468 U.S. at 101-02. The *Board of Regents* case is not dealt with in the text of this Comment because the holding of the case is not based on the NCAA in setting eligibility rules. *Id.* at 92.

93. *McCormack*, 845 F.2d at 1343. (citing extensively from NCAA v. Board of Regents of the Univ. of Okla, 468 U.S. 85, 100-23 (1984)).

94. *Id.* at 1344-45.

95. *Id.* at 1344 (quoting NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984)).

96. *Id.* The *McCormack* panel opined that the "eligibility rules create the product and

Three lines of reasoning can be taken from the *McCormack* case: (1) the amateurism component; (2) the educational component; leading to (3) the procompetitive component.[97]

B. *Challenges to the No Agent and No Draft Rules*

Prior to the *Gaines v. NCAA*[98] and *Banks v. NCAA*[99] cases, the antitrust challenges of the NCAA eligibility rules primarily focused on the NCAA regulation prohibiting compensation of student-athletes either prior to college, or during their eligibility.[100] The *Gaines* and the *Banks* cases, however, challenged the no agent[101] and no draft[102] regulations, which (1) prohibit student-athletes

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allow its survival in the face of commercializing pressures." *Id.* at 1345 (citing NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984)).

97. *Id.* at 1344-45.

98. 746 F. Supp. 738 (M.D. Tenn. 1990).

99. Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1350 (1993); Banks v. NCAA, 746 F. Supp. 850 (N.D. Ind. 1990).

100. McCormack v. NCAA , 845 F.2d 1338, 1340 (5th Cir. 1988); Justice v. NCAA, 577 F. Supp. 356, 362 (D. Ariz. 1983); Jones v. NCAA, 392 F. Supp. 295, 297-98 (D. Mass. 1975).

101. NCAA BYLAWS, *supra* note 13, art. 12.3 (discussing the use of agents in general). Article 12.3 provides in pertinent part:

> An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.
>
> An individual shall be ineligible per [the above paragraph] if he or she enters into a verbal or written agreement with an agent for representation in future professional sports negotiations that are to take place after the individual has completed his or her eligibility in that sport.
>
> A lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact with a professional sports organization on behalf of the student-athlete. A lawyer's presence during such discussions is considered representation by an agent.

Id. arts. 12.3.1, 12.3.1.1, 12.3.2.1.

102. NCAA BYLAWS, *supra* note 13, art. 12.2.4 (discussing professional drafts). Article 12.2.4 states in pertinent part:

> An individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport, even though:
>
> (a) The individual asks that his or her name be withdrawn from the draft list prior to the actual draft;
>
> (b) The individual's name remains on the list but he or she is not drafted, or
>
> (c) The individual is drafted but does not sign an agreement with any professional athletics team.

from agreeing to be represented by an agent and (2) prohibit the student-athlete from voluntarily entering a professional league draft.

Gaines was based on an antitrust attack under section 2 of the Sherman Act which deals with the unlawful exercise of monopoly power.[103] The plaintiff in the *Gaines* case was declared ineligible under the no agent and no draft rules to participate in college football.[104] The *Gaines* court held that the no agent and no draft rules were not subject to Sherman Act antitrust scrutiny.[105] The court in *Gaines* reasoned that the no agent and no draft rules were not commercial in nature, but rather preserved the amateurism and educational components of collegiate sports.[106]

> An individual may request information about professional market value without affecting his or her amateur status. Further, the individual, his or her legal guardians or the institution's professional sports counseling panel may enter into negotiations with a professional sports organization without the loss of the individual's amateur status

Id. at arts. 12.2.4.2, 12.2.4.3.

103. *See* Gaines v. NCAA, 746 F. Supp. 738, 741 (M.D. Tenn. 1990); 15 U.S.C. § 2 (Supp. IV 1992). The *Gaines* court stated that an illegal monopoly pursuant to § 2 of the Sherman Act consists of:

> (1) the possession of monopoly power in the relevant market and
> (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Gaines, 746 F. Supp. at 742 (citing Beard v. Parkview, 912 F.2d 138 (6th Cir. 1990) (quoting United States v. Grinnell, 384 U.S. 563, 570-71 (1966))).

104. *Gaines*, 746 F. Supp. at 740. Bradford L. Gaines sought a temporary restraining order and preliminary injunction against defendants NCAA, the Southeastern Conference, and Vanderbilt University, to enjoin them from enforcing the no agent and no draft rules. *Id.* Prior to his final year of eligibility, Gaines petitioned the NFL to be included in the 1990 NFL draft. *Id.* Gaines was not drafted, but was contacted by one NFL team about a possible free agent contract. *Id.* This option was explored by Tim Greer who acted as Gaines's brother's agent in the CFL. *Id.* Greer also contacted several other NFL teams in an attempt to get Gaines a professional contract, but was unsuccessful. *Id.* As a result of the no agent and no draft rules, Gaines was ineligible for his final season at Vanderbilt. *See id.*

105. *Id.* at 744-45.

106. *Id.* The *Gaines* court took the NCAA purposes at face value and stated:

> The overriding purpose of the eligibility Rules, thus, is not to provide the NCAA with commercial advantage, but rather the opposite extreme — to prevent commercializing influences from destroying the unique "product" of NCAA college football. Even in the increasingly commercial modern world, this Court believes there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body. The overriding purpose behind the NCAA Rules at issue in this case is to preserve the unique atmosphere of competition between "student-athletes." This Court, therefore, rejects the notion that such Rules may be judged or struck down by federal antitrust law.

Id. (citing NCAA Memorandum in Opposition to Plaintiff's Request for Preliminary Injunc-

Notwithstanding the above holding, the *Gaines* court undertook an analysis as if the Sherman Act applied to the NCAA eligibility rules.[107] The court found that the challenged eligibility rules did not violate section 2 of the Sherman Act.[108] The court found that the eligibility rules were not unreasonably exclusionary or anticompetitive.[109] Rather, the court reasoned that the eligibility rules protected the amateur nature and "educational underpinnings" of collegiate football.[110] Therefore, the court specifically pointed to the no agent and no draft rules as having primarily procompetition effects in that they distinguished collegiate football from professional football.[111]

Even though the *Gaines* court considered an alleged illegal monopoly under section 2 of the Sherman Act rather than illegal collusion in restraint of trade under section 1, the court relied on the now familiar reasoning of prior cases: (1) the amateurism component; (2) the educational component; and the resulting (3) procompetitive component.[112]

Barely one month prior to the *Gaines* decision,[113] the United States District Court for the Northern District of Indiana had the opportunity to evaluate a similar antitrust challenge of the no agent and no draft rules.[114] In *Banks I* the plaintiff who lost his eligibility argued that the no agent and no draft rules violated section 1 of the Sherman Act.[115] The *Banks I* court rejected this

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tion, at 23.)

107. *Id.* at 745.

108. *Id.* at 746-47. The analysis under § 1 and § 2 of the Sherman Act is not identical, but the reasonableness of the alleged restraint is at the core of both analyses. *Id.* at 746. The court in *Gaines* stated that "the critical question becomes whether the NCAA eligibility Rules are 'unreasonably exclusionary' or 'anticompetitive.'" *Id.* at 745.

109. *Id.* at 746.

110. *Id.*

111. *Id.* at 746-47.

112. *Id.*

113. The *Gaines* and *Banks I* decisions are discussed out of chronological sequence because *Banks I* applied the antitrust laws more broadly to NCAA action then did any prior case.

114. Banks v. NCAA, 746 F. Supp. 850, 855 (N.D. Ind. 1990). Banks sought an injunction against enforcement of the no agent and no draft rules by either the NCAA or the member institution, i.e., Notre Dame. *Id.*

115. *Id.* In addition to entering the NFL supplemental draft, Banks entered an oral agreement with an agent who would represent Banks. *Id.* at 853-54. By entering the supplemental draft and by agreeing to have an agent market Mr. Banks's football abilities to NFL teams, the no draft and no agent rules rendered him ineligible. *Id.* at 855.

argument.[116] Primarily, the court reasoned that the rules did not have an anticompetitive purpose and were directly related to preserving the amateur nature of the competition.[117]

The NCAA relied on the *Jones* and *Gaines* line of reasoning, i.e., the NCAA bylaws challenged by Banks regulate noncommercial activity and are, therefore, not subject to antitrust attack.[118] The court in *Banks I* noted that many of the NCAA's regulations were related to defining and preserving collegiate competition and, therefore had a procompetitive effect.[119] The *Banks I* court, however, was not convinced that NCAA regulations which preserve the amateurism and educational quality of collegiate sports are necessarily free from scrutiny under the Sherman Act.[120] In fact, the *Banks I* court was unwilling to rely on *Jones* which found that the antitrust laws were not applicable to NCAA eligibility rules.[121]

After finding that the NCAA eligibility rules are susceptible to antitrust challenge, the *Banks I* court addressed the merits of the antitrust claim through a rule of reason analysis.[122] In essence, the *Banks I* court observed that Banks had to show (1) a restriction on a market and, if such a restriction had occurred, (2) the anticompetitive effects of the restriction outweighed the procompetitive effects.[123]

First, with respect to a restriction on a market, the court stated that a determination must be made as to whether a restraint merely regulates an activity so as to have a procompetitive effect or whether the restraint suppresses competition.[124] The court stated that the plaintiff must be able to show that the defendant, by restraining competition in the market, is able to raise prices in the market.[125] The court undertook a technical analysis of whether the no agent and no draft rules reduced competition and increased

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116. *Id.* at 862.
117. *Id.*
118. *Id.* at 856.
119. *Id.* at 856-57 (citing NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 101-02 (1984)).
120. *Id.* at 857 (questioning the logic of Jones v. NCAA, 392 F. Supp. 295 (D. Mass 1975)).
121. *Id.* The *Banks I* court apparently interpreted the *Jones* conclusions with respect to the scope of the antitrust laws to be far too narrow. *See id.*
122. *Id.* at 858.
123. *Id.* at 858, 860.
124. *Id.* at 858 (citing National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691 (1978); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).
125. *Id.*

prices in any market related to football.[126] The court was clearly unsuccessful in this endeavor and missed the thrust of what in reality was taking place.[127] The court tried to explore the effect of the no agent or no draft rule on the value of a college football scholarship,[128] concluding that the record reflected no clear impact.[129] The court then evaluated whether the no agent and no draft rules had any impact on the price the NFL paid for collegiate athletes.[130] The court again stated that the record did not reflect that this market had been so restrained so as to increase price.[131] The *Banks I* court then concluded its market evaluation by stating that the record did not indicate that the no agent and no draft rules restrained competition in the market.[132]

Second, with respect to showing whether the no agent and no draft rules had a negative impact on competition which outweighed

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126. *Id.* at 858-60. The *Banks I* court explored several possible markets: (1) NCAA member football programs; (2) players who desire to play football for a NCAA member institution; (3) players who are contemplating entry into a professional draft and thus risking eligibility; (4) all entities which provide football programs including the NCAA members, the NFL, and the CFL, and more broadly (5) "a segment of the entertainment industry." *Id.*

127. *See id.* at 859-60; Banks v. NCAA, 977 F.2d 1081, 1098 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part) (discussing the distinction between product market and a labor market where a restraint lowers prices or wages), *cert. denied*, 113 S. Ct. 1350 (1993).

128. *Banks I*, 746 F. Supp. at 859.

129. *Id.*

130. *Id.*

131. *Id. But see infra* notes 156-158 and accompanying text (discussing the fact that in a labor market, as opposed to a product market, the restraint on labor reflects itself through a decrease in the price or benefits paid to labor, not an increase in price).

132. *Banks I*, 746 F. Supp. at 860. Banks also presented the argument that the regulations in question were overbroad because they render many players ineligible who have not signed a professional contract and have not received anything of value from any team or agent. *Id.* In essence Banks argued that the no agent and no draft rule renders student-athletes ineligible as professionals when in fact the student-athletes are amateurs in every sense of the word. *Id.* The *Banks I* opinion states:

> Mr. Banks argues that the Bylaws at issue constitute unreasonable restraints upon the activities of individuals like him since they are overbroad and sweep within their ambit many players who are still amateurs in every meaningful sense of the word, because they have not signed a professional athletic contract and have received nothing of value from any team, agent, or other person, except reimbursement for travel expenses to attend tryouts.

Id. The *Banks I* court effectively dodged the issue stating that the rule of reason does not evaluate whether a restraint is reasonable with respect to being rationally related to a legitimate purpose. *Id.* The court wrote that such a constitutional analysis would be barred by *NCAA v. Tarkanian*. *Id.*, NCAA v. Tarkanian, 488 U.S. 179 (1988). *See also supra* note 6 (discussing the *Tarkanian* case).

the procompetitive effect, Banks was also unsuccessful.[133] The court held that the procompetitive aspects of the no agent and no draft rules outweighed the anticompetitive effects.[134] The *Banks I* court, in effect, reasoned that the no agent and no draft rules "bear some nexus" to the NCAA's procompetitive purpose.[135] In other words, the court's holding and reasoning indicate that the no agent and no draft rules promote the amateurism and the educational components of intercollegiate football and are, thereby, procompetitive.[136]

The *Banks I* reasoning is fourfold in that the no agent and no draft rules: (1) do not restrain a market; (2) do promote amateurism; (3) do promote the educational nature of collegiate football; and as a result of numbers two and three (4) are procompetitive.[137]

In *Banks II* the United States Court of Appeals for the Seventh Circuit had the opportunity to consider Banks's antitrust challenges.[138] The *Banks II* court upheld the district court's dis-

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133. *Banks I*, 746 F. Supp. at 860-62.

134. *Id.* at 860.

135. *Id.*

136. *Id.* at 860-62. *But see id.* at 862. In a paragraph the *Banks I* court managed to raise doubts about whether the no agent and no draft rules in fact promote amateurism, but in the same paragraph *Banks I* showed tremendous deference to NCAA logic. *Id.* The court stated:

> It may be, as Mr. Banks argues, that the NCAA's "no draft" and "no agent" rules protect a flawed concept of amateurism. Whether an athlete who has received nothing more that two payments of expenses, or who asked a family friend to attempt to interest NFL teams in his services, would be perceived as a professional by the average citizen is debatable; whether the average citizen would consider a professional baseball player to be an amateur college basketball player may be less debatable. Nonetheless, the Bylaws at issue seek to define amateurism for purposes of intercollegiate athletic eligibility, and the need for such a definition is central to a procompetitive purpose. "That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable."

Id. (quoting in part McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988)).

137. *Id.* at 858-62.

138. Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1350 (1993). Following the denial of his preliminary injunction action, Banks filed an amended complaint requesting a permanent injunction preventing the NCAA from enforcing the no agent and no draft rules. *Id.* at 1084. Banks sought the permanent injunctive relief on behalf of student-athletes who were similarly situated to Banks, i.e., who would be eligible, but for the no agent and no draft rules. *See id.* Banks had to challenge the rules in a class action type format. *Id.* Since the *Banks I* decision, Braxston Banks had become ineligible under article 14.2 of the NCAA bylaws. *Id.* Article 14.2 states that a player must use his eligibility within five years of registration as a full-time student. NCAA BYLAWS, *supra* note 13, art. 14.2.1. Banks also sought treble damages for $16,000 for the lost scholarship, the value of a lost year of

missal of Banks's amended claim based on a failure to state a claim.[139] The trial court dismissed, according to the *Banks II* majority, because Banks failed to allege that the rules in question had any anticompetitive impact on a discernible market.[140] *Banks II*, however, noted that Banks did set forth three examples of how the no agent and no draft rules restrained trade or commerce,[141] but the court determined that he did not define how these restraints were anticompetitive on a discernible market.[142]

Even though the *Banks II* majority upheld the trial court based on its finding of a flaw in the complaint, the court undoubtedly would have held that the no agent and no draft rules were not anticompetitive even if Banks had alleged an anticompetitive im-

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education, and the lost value of another year of football at Notre Dame. *Id.*

139. *Id.* at 1082-83, 1094. *See also* FED. R. CIV. P. 12(b)(6). *Banks II* also found that Banks lacked proper standing to seek a permanent injunction against the no agent and no draft rules on behalf of a represented class. *Banks II*, 977 F.2d at 1085.

140. *Banks II*, 977 F.2d at 1087. The *Banks II* court noted that under a rule of reason analysis, which was applicable in this case, *id.* at 1088 (citing NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85 (1984)), the "plaintiff must allege, not only an injury to himself, but an injury to the market as well." *Id.* (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107-08 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985)).

141. *Id.* at 1088. Banks alleged the rules at issue restrained trade or commerce in the following three ways:

> (a) First, there is the restraint imposed by the NCAA on all its member institutions that restricts them from offering a player such as Banks, who enters the draft and/or retains an agent, an opportunity to play college football again. The relevant market on which that restraint is imposed is all those players who wish to play for major college football teams, a market dominated by the NCAA.
>
> (b) Second, the Rules operate as a restraint on all members of the NCAA requiring them to abide by the rules, and not to change them or grant waivers from them. This restraint operates directly on member institutions such as Notre Dame and indirectly, although intentionally, on players such as Banks. The relevant market is all major college football institutions since all NCA [sic] member institutions are subject to similar restrictions, and hence players like Banks are foreclosed from choosing a major college football team based on the willingness of the institution to waive or change its rules, or consider doing so.
>
> (c) The rules also operate to restrain the ability of a player such as Banks from marketing his services to the NFL, by effectively giving him one and only one realistic chance to be drafted by the NFL. The relevant market being restrained is composed of players like Banks who are considering entering the NFL draft while they still have college football eligibility remaining.

Id.

142. *Id.* The *Banks II* court wrote, "But regardless of how charitably the complaint is read, it has failed to define an anticompetitive effect of the alleged restraints on the markets." *Id.* The court articulated three possible markets: "(1) NCAA football players who enter the draft and/or employ an agent[;] (2) college institutions that are members of the NCAA .[; and (3)] the NFL player recruitment market." *Id.*

pact on a market.[143] Rather than interpreting the no agent and no draft rules as being anticompetitive, *Banks II* engaged in a lengthy discussion which followed the conclusions of the prior related cases — that the NCAA rules promoted the amateurism and educational components and were, therefore, procompetitive.[144]

The *Bank II* majority's reasoning can be summarized as follows: (1) while certain players may be barred from collegiate football pursuant to the no agent and no draft rules, this does not mean that the rules have an anticompetitive effect on a market; (2) the no agent and no draft rules preserve amateurism; (3) the no agent and no draft rules protect the educational values of college football; and because of numbers two and three (4) the no agent and no draft rules are procompetitive in nature.[145]

The dissenting judge in *Banks II* broke with the tradition of deference to the NCAA, and attempted to scrutinize the NCAA's eligibility rules with respect to antitrust challenges.[146] The dissent found that Banks's complaint not only defined a market, but also described how the NCAA rules at issue restrained competition in the market.[147]

The dissent agreed with Banks's assessment that the relevant market was the "nationwide labor market for college football players."[148] Focusing on the no draft rule, the dissent found that the rule restrains competition in the market because it disallows members of the NCAA from waiving the rule in order to make the institution more attractive to the supplier in the market — the football student-athlete.[149] In support of this conclusion, Judge

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143. *See id.* at 1088-93 (discussing extensively why the NCAA regulations and particularly the no agent and no draft rules are procompetitive in effect).

144. *Id.*

145. *Id.* at 1088-94.

146. *Id.* at 1095-101 (Flaum, J., concurring in part and dissenting in part).

147. *Id.* at 1094. The dissent observed that the trial court in *Banks I* found that the plaintiff had set forth credible anticompetitive effects of the no agent and no draft rules, but that the trial court concluded that they were outweighed by the procompetitive effects of the rules. *Id.* at 1094 n.*, (citing Banks v. NCAA , 746 F. Supp. 850, 860 (N.D. Ind 1990)). The dissent opined that the district court had changed its position between *Banks I* and the filing of the new complaint seeking separate relief, which lead to the *Banks II* appeal. *Id.*

148. *Id.* at 1095. The dissent found that players are the suppliers in the market for college football players and that colleges are the purchasers. *Id.* The majority which took a very purist look at college football, took offense at this characterization of college football. *Id.* 1090-93.

149. *Id.* at 1095. Judge Flaum stated:

If the no-draft rule were scuttled, colleges that promised their athletes the opportu-

Flaum relied on settled law that "an agreement among employers to control a material term of employment harms competition in the labor market at issue."[150] The dissent in *Banks II* focused on a group of players who have eligibility remaining, are excellent collegiate players, but are not as yet certain NFL caliber players (highly talented players).[151] Particularly, the no draft rule has an anticompetitive impact on these players because they cannot "test the waters in the NFL" to determine the value of their athletic talents in the NFL.[152] Since such a player cannot test the waters of the NFL without being barred from returning to collegiate football, the dissent reasoned that the situation was, in essence, an agreement among colleges to control a term of employment in the market.[153] The dissent suggested that by hindering competition in the labor market in this way, the NCAA members are able to "squeeze out of their players one or two more years of service, years the colleges might have lost had the ability to enter the draft without consequence to eligibility been the subject of bargaining between athletes and colleges."[154]

Furthermore, the dissent in *Banks II* addressed the traditional requirement under a rule of reason analysis that the challenged antitrust restraint must harm consumers.[155] The dissent articulated the difference between a product market and a labor market.[156] Whereas in the product market antitrust harm is manifested in higher prices, in the labor market antitrust harm is demonstrated through lower wages or perhaps lost benefits.[157] In this respect, it

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> nity to test the waters in the NFL draft before their eligibility expired, and return if things didn't work out, would be more attractive to athletes than colleges that declined to offer the same opportunity. The no-draft rule eliminates this potential element of competition among colleges, the purchasers of labor in the college football labor market.

Id.

150. *Id.* (citing Radovich v. National Football League, 352 U.S. 445 (1957); Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332 (7th Cir. 1967)). Judge Flaum also noted that "'[j]ust as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services.'" *Id.* at 1097 (quoting PHILIP AREEDA & DONALD F. TURNER, II ANTITRUST LAW ¶ 3380, at 199-200 (1978)).

151. *Id.* at 1095.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 1097-98.

156. *Id.* at 1097.

157. *Id.* at 1098. In response to the NCAA argument that consumers are not harmed by

was clear to Judge Flaum that, at least, Banks had alleged a restriction of competition in the labor market sufficient to carry his antitrust claim beyond the motion to dismiss stage.[158]

Finally, in dicta, the dissent made three more crucial points. First, even if Banks was able to survive a motion to dismiss, he would have had to prove that the anticompetitive effects of the no agent and no draft rules outweighed the procompetitive effects.[159] Second, the dissent warned against being drawn into the antiquated notion that the NCAA is not a commercial enterprise as was suggested in the *Jones* and *Gaines* cases.[160] Third, the dissent cast doubt on the traditional values of amateurism and education in intercollegiate competition.[161]

The *Banks II* dissent reasoning can be summarized as follows: (1) there is a market for college football players, particularly those who would test the NFL waters and return to a NCAA member but for the no draft rule; therefore, the no draft rule has an anticompetitive effect on a market;[162] (2) whether the anticompetitive effect of the no agent and no draft rule outweighs the procompetitive effect is a subject of debate;[163] (3) the NCAA is

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the rules in question, Judge Flaum stated:

> By "consumers," the NCAA apparently means people who watch college football. These individuals certainly are consumers in the college football *product* market, but the market at issue here is the college football *labor* market, and the NCAA member colleges are consumers in that market. It would be counterintuitive to require Banks to demonstrate that the no-draft and no-agent rules harm colleges, the very entities that established those rules Concerted action among consumers that lowers prices harms competition as much as concerted action among producers that raises prices.

Id.

In *Banks I* the court, in an effort to determine whether the NCAA had the ability to raise prices by restricting output, stated that "[i]t does not appear that the flow of players to the NFL has been so restricted as to raise prices." Banks v. NCAA, 746 F. Supp. 850, 859 (N.D. Ind. 1990). Especially in view of the *Bank II* dissent, the reasoning of the *Banks I* court reflects the latter's lack of understanding. *See Banks II*, 977 F.2d at 1098 (Flaum, J., concurring in part and dissenting in part). Of course the NCAA does not want to raise "prices" — what it must offer to student-athletes in the form of a scholarship to get them to play football. *See id.* Neither does the NFL want to increase the prices it must pay players coming out of college.

158. *Banks II*, 977 F.2d at 1098 (Flaum, J., concurring in part and dissenting in part).

159. *Id.*

160. *Id.* at 1098-99 (discussing the billion dollar business in which the NCAA is engaged).

161. *Id.* at 1099 (stating that "it is disquieting to think of college football as a business, of colleges as purchasers of labor, and of athletes as the suppliers").

162. *Id.* at 1095, 1098.

163. *Id.* at 1098.

certainly a commercial enterprise;[164] and (4) traditional notions of the student-athlete being an amateur and of educational values always taking priority should not be blindly followed.[165]

C. Summary of Case Law

1. Threshold: Application of the Sherman Act

Are the no agent and no draft rules within the Sherman Act's ambit? *Jones*[166] and *Gaines*[167] held that the answer to this question was no. *McCormack*[168] declined to resolve the issue. To transgress this threshold issue a antitrust challenge would have to address prior case law which reasoned that the NCAA eligibility rules are not commercial or business-like within the contemplation of the Sherman Act.[169]

2. Reasoning: Violation of the Sherman Act

Do the no agent and no draft rules violate the Sherman act? Once the threshold question number one above had been met, the successful plaintiff would have to counter the lines of reasoning courts have relied on in upholding the eligibility rules under the Sherman Act. In this respect the athlete would have to show the following: (1) there is a substantial labor market for collegiate football players whose athletic skills are at least good enough to be considered NFL caliber qualifications;[170] (2) at least tacitly, there is collusion between the NFL and NCAA to restrict the labor market articulated in number one; (3) the no agent and no draft rules do not promote amateurism; (4) the no agent and no draft rules do not protect the educational components of NCAA goals; and (5) tied in with numbers three and four, the no agent and no draft rules, as they are now enforced, are not critical to the survival of collegiate football, i.e., the rules are not procompetitive.[171]

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164. *Id.* at 1098-100.
165. *Id.* at 1099.
166. 392 F. Supp. 295 (D. Mass. 1975).
167. 746 F. Supp. 738 (M.D. Tenn. 1990).
168. 845 F.2d 1338 (5th Cir. 1988).
169. *Jones*, 392 F. Supp. at 303.
170. Banks v. NCAA, 977 F.2d 1081, 1088 (7th Cir, 1992) (stating that a Sherman Act violation requires an anticompetitive effect on a discernible market), *cert. denied*, 113 S. Ct. 1350 (1993).
171. *Cf. id.* at 1089-94 (discussing that the no agent and no draft rules protect the

IV. COUNTERING THE REASONING WITH RESPECT TO THE NO AGENT AND NO DRAFT RULES

A. The NCAA Is a Commercial Enterprise

The NCAA is clearly a commercial enterprise.[172] As an entity the NCAA generates billions in revenues.[173] It has also been recognized that the NCAA and its members are involved in a business that far exceeds a majority of for-profit businesses.[174]

Furthermore, the NCAA clearly serves an economic function for its members.[175] The NCAA's development has naturally followed an evolution where the decisions are based on profit, not student welfare.[176] Some, in fact, argue that the NCAA primarily functions as an economic entity.[177] Further, the argument has been made that the NCAA reforms its bylaws mainly when competition becomes unequal; thereby, it maintains the competitive balance and in turn, higher profits.[178]

Notwithstanding the validity of the NCAA's contention that the no agent and no draft rules promote amateurism, protect the education of students, and thereby promote competition, in reality, the

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amateurism and educational components of collegiate football and are, therefore, procompetitive).

172. *Banks II*, 977 F.2d at 1098-99 (Flaum, J., concurring in part and dissenting in part). The dissent in *Banks II* expressed concern that the dismissal of Banks's claim would "provide comfort to the NCAA's incredulous assertion that its eligibility rules are 'noncommercial.'" *Id.* at 1098. The dissent further stated, "The NCAA would have us believe that intercollegiate athletic contests are about spirit, competition, camaraderie, sportsmanship, hard work (which they certainly are) and nothing else." *Id.* at 1098-99 (ellipsis in original).

173. *See supra* note 4 (discussing a billion dollar NCAA television basketball contract and $500 million of revenue produced by 104 Division 1-A college football programs). Some other interesting facts regarding the revenue generating capacity of the NCAA include: (1) at one time the Mobil Cotton Bowl received approximately $1.5 million from Mobil; (2) in 1990 estimates were that Division 1-A sports revenues exceeded $1 billion annually; and (3) the University of Michigan football program yielded a cool $2 million profit for 1984. *Banks II*, 977 F.2d at 1099 (Flaum, J., concurring in part and dissenting in part).

174. Gaines v. NCAA, 746 F. Supp. 738, 743 (M.D. Tenn. 1990). *See also* Koch, *supra* note 2, at 16.

175. Justice v. NCAA, 577 F. Supp. 356, 383 (D. Ariz. 1983) (stating that certain NCAA rulemaking activity reflects "a discernible economic purpose"). This is not to insinuate that the NCAA does not have a genuine concern for the student-athlete's education or welfare in general. *But see* Chin, *supra* note 4, at 1249 (stating that "educational values no longer exist as a major factor in the business world of big-time college athletics").

176. Koch, *supra* note 2, at 15.

177. *Id.*, Chin, *supra* note 4, at 1231.

178. Koch, *supra* note 2, at 16. Academic initiatives often take a back seat to rules which are necessary to maintain profits. *See id.*

NCAA is a commercial enterprise.[179] Dollar figures that climb to the hundreds of millions and billions do not lie.[180] Therefore, an antitrust challenge should be able to establish that the no agent and no draft rules are part of an overall NCAA scheme which is sufficiently commercial in nature to justify antitrust scrutiny.[181]

B. *Restraint of a Market*

There is a market for highly talented collegiate football players consisting of the NFL and the NCAA as the alternative purchasers which provide benefits to the football players as producers of labor.[182] Football players exist who have eligibility remaining, but

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179. Banks v. NCAA, 977 F.2d 1081, 1098-99 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part), *cert. denied*, 113 S. Ct. 1350 (1993).

180. *See id.* Judge Flaum, with uncanny recognition of reality, stated:

> The NCAA continues to purvey, even in this case, an outmoded image of intercollegiate sports that no longer jibes with reality. The times have changed. College football is a terrific American institution that generates abundant nonpecuniary benefits for players and fans, but it is also a vast commercial venture that yields substantial profits for colleges.

Id. at 1099.

181. *See id.*, Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1305-07 (1992) (discussing the fact that the *Gaines* holding that the NCAA eligibility rules were not subject to antitrust law was a mistaken interpretation of *NCAA v. Board of Regents of the Univ. of Okla.*, which in dictum stated that the NCAA eligibility rules are procompetitive, not that the rules are not subject to antitrust scrutiny).

182. *Cf. Banks II*, 977 F.2d at 1095 (Flaum, J., concurring in part and dissenting in part). The market defined as the NFL and NCAA as purchasers or consumers of labor and highly talented collegiate football players as the suppliers is different in concept from the market set forth in the *Banks II* dissent. In *Banks II*, the dissent set forth a "nationwide labor market for college football players." *Id.* The dissent opined that the no agent and no draft rule — the emphasis in the opinion was on the no draft rule — eliminated an element of competition among the NCAA member institutions in trying to induce players to come to their institution rather than go to others. *Id.* According to the dissent, if the NCAA members were not bound by the no draft rule then the institution could offer the student-athlete the ability to test the NFL waters and return to college if he did not get drafted. *Id.* This would give schools not enforcing a form of the no draft rule a competitive advantage in gaining athletes over schools which enforced some form of the no draft rule. *Id.* at 1096.

The dissent without explicitly stating so, also explored the market described in the text as the NFL and the NCAA, as a unit, as purchasers and possible competitors for football players. *See id.* at 1095, 1099-100 (discussing the theory that talented players are bound to the NCAA even though they may be capable of competing in the NFL, and that the NFL gets the benefit of well developed players). *See also* Frederick C. Klein, *College Football: Keeping 'em Barefoot*, WALL ST. J., Sept. 4, 1987, at 15.

The market of the NCAA and NFL as purchasers and the highly talented college players as the suppliers was raised in *Gaines*. Gaines v. NCAA, 746 F. Supp. 738, 745 (M.D. Tenn. 1990). Because the *Gaines* court did not necessarily have to reach the market issue, the court dismissed this possible market definition out of hand with no reasoning except:

who are talented enough to at least realistically try to ascertain whether they are presently good enough to play in the NFL.[183] There are also players having remaining eligibility who are virtually certain NFL caliber players, but who are uncertain as to how highly they would be drafted.[184] These highly talented football players provide their football skills to two primary football entities, the NFL and NCAA.[185] Because these players have eligibility remaining, NCAA members are willing to offer the student-athlete free tuition, room, and board to play football at a particular institution.[186] The NFL, on the other hand, is obviously interested in paying some of these highly talented athletes considerable sums of money to play football professionally.[187] These facts plainly contradict the conclusion of the *Gaines* court that there is no discernible

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"This Court is hard-pressed to see any validity to the parties' interpretation of college football players like Brad Gaines as "sellers" and NCAA schools and professional football leagues or teams as "buyers" in an economic market. *Id.*

183. *Banks II*, 977 F.2d at 1095 (Flaum, J., concurring in part and dissenting in part) (discussing "bubble players" who are excellent football players, but not necessarily *certain* NFL caliber players). *See also* Hal Bock, *Declaring Early: It's a Coming Out Party*, L.A. TIMES, Jan. 16, 1994, at C8 (stating that 29 players with remaining eligibility entered the 1994 NFL draft, 46 players entered the 1993 draft, and 48 entered the 1992 draft); Curt Brown, *A Matter of Class: Juniors Might Dominate Draft: Underclassmen Starting to Come Out in Droves*, STAR TRIB., Apr. 22, 1993, at C1 (stating that 37 underclassmen declared themselves eligible for the 1993 NFL draft and that in the 1990s 156 underclassmen have foregone collegiate eligibility).

184. Bock, *supra* note 183 (discussing that even the very highly talented Marvin Jones of Florida State was unsure when he would be drafted).

185. *But see Gaines*, 746 F. Supp. at 745. The NCAA in *Gaines* had argued that it lacked monopoly power because of the existence of the CFL, WLAF, and the Arena Football League. *Id.* The WLAF is no longer in existence. *See WLAF Sees New Life in Europe*, NEWSDAY, July 29, 1993. The CFL and Arena Football League are in existence, and some franchises are doing very well, but the leagues are clearly not equal in quality of play to the NFL. *See* Leslie Eaton, *Wall Street; They're Not Exactly Batting .500*, N.Y. TIMES, Feb. 27, 1994 (referring to arena football as "a sort of B-team ball played indoors"); Kevin B. Blackistone, *NFL Needs Ward More Than He Needs the NFL*, DALLAS MORNING NEWS, May 1, 1994 (referring to Doug Flutie, who had an unsuccessful NFL career, but is now a star in the CFL); R.E. Graswich, *Lots of Players, Not Enough Fans*, SACRAMENTO BEE, May 1, 1994 (stating that the CFL would often "retrieve players waived by the NFL"). Clearly the NFL is *the* league highly talented collegiate football players aspire to become part of; therefore, the CFL and Arena Football League are not considered significant players in the market for highly talented players.

186. Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1350 (1993).

187. Gordon Forbes and Larry Weisman, *Jets Dispute Terms of Jones' Contract*, USA TODAY, Aug. 9, 1993, at C10 (stating that, at least, Marvin Jones's contract was worth $5.988 million over 5 years).

economic market involved.[188]

In this market of highly talented football players as suppliers and the NFL and NCAA as purchasers/consumers, it is easy to see how the no agent and no draft rules restrain the market. Talented players with remaining eligibility, who have a reasonable chance of earning a living as a professional, will not take the risk of entering the NFL draft for fear of not being drafted and then not being able to go back to collegiate football.[189] For many reasons, the NCAA does not want quality players leaving collegiate football to play professionally.[190] The potential effect of every highly talented, eligible player that leaves college is that the university where he played may lose money in the form of lost bowl prizes, tournament awards, and fewer television appearances.[191]

From the athletic program's perspective a talented student's continued presence on campus will mean more money for the athletic program.[192] A larger athletic budget can only increase the chances of future success for the program. A successful program can be directly related to an athletic department member's job benefits and security.[193] It is no surprise that college football coaches are

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188. Gaines v. NCAA, 746 F. Supp. 738, 745 (M.D. Tenn. 1990).

189. *Banks II*, 977 F.2d at 1095 (Flaum, J., concurring in part and dissenting in part). The *Banks II* dissent stated:

> Consider, for example, athletes who are known in the vernacular as "bubble" players. These athletes are excellent competitors at the collegiate level, but for various reasons are considered less than certain NFL prospects. Bubble players who wish to market their wares in the professional market after their sophomore or junior year will forego entry into the NFL draft because, if they are not selected (or fail to join a team after being selected), the rule will prevent them from returning to college to hone their skills and try again in subsequent years.

Id. (citing Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1311 (1992)). Out of 46 players who entered the 1993 draft with remaining eligibility, 24 were selected. Bock, *supra* note 183. In 1992, 25 out of 48 players were selected. *Id.* *See also* Lock, *supra* note 2, at 654 (discussing the fact that once a football student-athlete is rendered ineligible by the no draft rule, he effectively has "no realistic alternative for developing [his] talent or for maturing physically").

190. Banks v. NCAA, 746 F. Supp. 850, 860-61 (N.D. Ind. 1990) (noting the NCAA's argument that the nonexistence of the no draft rule would "create a number of potential problems for the effective management of teams engaged in college football"). Not coincidentally, the NFL would also suffer disruption if the no draft rule were terminated. *Id.* at 861 n.13.

191. *See* Koch, *supra* note 2, at 10. With respect to basketball, Patrick Ewing was worth $3 million annually to Georgetown University as a basketball center. *Id.*

192. *See supra* note 4 (discussing the revenues generated by NCAA member athletic programs); Chin, *supra* note 4, at 1238-39.

193. *Cf.* Lock, *supra* note 5, at 645-46 (stating that the salaries of many coaches at major institutions are "several times greater" than the salaries of university presidents).

resentful when a great collegiate player leaves their program with remaining eligibility.[194] Dick Shultz, former NCAA Executive Director stated that underclassmen leaving for the NFL "has become a real thorn in the side of college football."[195] If players were able to enter the NFL draft and then regain eligibility, it would create a number of potential problems for the effective management of the teams engaged in collegiate football.[196]

The academic staff of an NCAA member institution is also benefitted by keeping talented players on the field. A quality sports team will increase the overall recognition of the university.[197] In addition, a successful sports program will lead to increased donations[198] which can be turned into new buildings and research projects,[199] thus benefiting academicians.

The NFL also has a significant interest in maintaining the status quo with respect to the no agent and no draft rules.[200] Taking the market of highly talented players as a whole, it is in the NFL's best interest to have most of these players remain in college and develop their football skills for four or five years.[201] Unlike MLB and the NHL which both have well developed minor league systems,[202] the NFL does not have an established minor league where younger players can develop their skills.[203] By having foot-

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194. *Id.* at 656 ("It is not uncommon for college football coaches to threaten, intimidate, and try to harm players and their agents who show an interest in leaving school prior to the expiration of their eligibility."). Lock used Craig Heyward, who played for the University of Pittsburgh, and David Fulcher, who played for Arizona State University, as examples of players who experienced their respective college coaches' wrath when the players decided to leave school early. *Id. See also* Brown, *supra* note 183 ("Football coaches, angry at the NFL for raiding their two-deep rosters, have locked out agents and severely limited the access pro scouts have to practices, videotapes and other inside fodder.").

195. Brown, *supra* note 183.

196. Banks v. NCAA, 746 F. Supp. 850, 860-61 (N.D. Ind. 1990).

197. While Bo Jackson was in prominence at the University of Auburn, annual applications increased from 4500 to 6200. Banks v. NCAA, 977 F.2d 1081, 1099 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part) (citing *It pays To Win . Or to Lose*, N.Y. TIMES, June 8, 1986, § 5, at 8), *cert. denied*, 113 S. Ct. 1350 (1993).

198. *Id.* (citing Clark, *The Business of Education: Does Athletics Help Or Hurt?*, WALL ST. J., Aug. 26, 1985, at 25).

199. Lock, *supra* note 5, at 647.

200. Lock, *supra* note 5, at 653 (stating that "the NFL always has had a vested interest in preserving the NCAA system that keeps college players in school for four or five years").

201. *Banks II*, 977 F.2d at 1099-100 (Flaum, J., concurring in part and dissenting in part); Lock, *supra* note 5, at 653.

202. *See* Lock, *supra* note 5, at 653 (discussing MLB's minor league system); THE HOCKEY BLACK BOOK 82 (1993) (listing the addresses of numerous minor league hockey teams).

203. Banks v. NCAA, 977 F.2d 1081, 1099 (7th Cir. 1992) (Flaum, J., concurring in part

ball players develop at the collegiate level for four or five years, the NFL is able to get well developed players without having to invest revenues into financing their own minor league system.[204] The NFL recently attempted to support a lasting minor league system in the form of the WLAF.[205] The league was a huge financial burden on the NFL and it was dismantled after its second season.[206]

In contrast to reality, the *Banks II* majority disagreed with the dissent and stated that the NCAA is not a minor league for the NFL.[207] Their reasoning is disingenuous. The majority reasoned that because only a small percentage of all collegiate football players go on to play at the NFL level, the NCAA could not be serving as a minor league.[208] There are two major problems with this reasoning. First, obviously not every player in any minor league goes on to the professional ranks. Second, it is the rare exception or fluke when an NFL player does not come out of a collegiate football program.[209]

The NFL has an additional reason for wanting to maintain the status quo of the no agent and no draft rule. In essence the no draft rule removes a significant potential bargaining chip of the players.[210] Obviously, a player negotiating with a professional team could command more compensation if he had the option of returning to the collegiate gridiron.[211]

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and dissenting in part), *cert. denied*, 113 S. Ct. 1350 (1993); Lock, *supra* note 5, at 653 ("The NFL has primarily depended upon colleges to train and develop young players.").

204. *Banks II*, 977 F.2d at 1099-100 (Flaum, J., concurring in part and dissenting in part); Lock, *supra* note 5, at 653.

205. Ron Borges, *Tagliabue Gets Rave Review; Commissioner Impresses Constituents After Running His First Owners' Meetings*, BOSTON GLOBE, Mar. 16, 1990 (stating that each NFL team provided $50,000 plus a line of credit up to $150,000 to the WLAF). Greg Logan, *A Tough Go for WLAF*, NEWSDAY, May 25, 1992, at 65 (stating that the NFL agreed to contribute millions of dollars to the WLAF in order to make a second season possible). *See also Around the NFL*, WASH. POST, Nov. 15, 1990, at D2.

206. *See WLAF Sees New Life in Europe*, NEWSDAY, July 29, 1993, at 137 (stating that the WLAF lost approximately $20 million in its first two seasons after which play was suspended); Logan, *supra* note 205.

207. *Banks II*, 977 F.2d at 1089-90.

208. *Id.* at 1090 n.12.

209. *See* USA TODAY, Apr. 26, 1994, at C10. Every player drafted in the 1994 NFL draft came from a collegiate football program. *Id.*

210. *See* Banks v. NCAA, 746 F. Supp. 850, 861 n.13 (N.D. Ind. 1990). *See also* Note, *Sherman Act Invalidation*, *supra* note 181, at 1309.

211. *Banks I*, 746 F. Supp. at 861 n.13. The *Banks I* court, in grossly understating the issue, stated that the option to return to collegiate football "would bring to contract negotiations a new development that NFL teams would find unwelcome." *Id. See also* Note, *Sherman Act Invalidation*, *supra* note 181, at 1309.

It is clear that an express agreement between defendants is not required under the Sherman Act.[212] Consciously parallel actions by business competitors can support the inference of collusion in violation of the Sherman Act.[213] Under a conscious parallelism analysis, the plaintiff would have to show that the business conduct of the defendants was interdependent, i.e., "that the defendants were conscious of each other's conduct and that their awareness was an element in their decisional process."[214]

The coinciding interests of the NCAA and NFL to have players remain in college for four or five years has lead to the argument of collusion between the NFL and NCAA with respect to the no agent and no draft rules.[215] In fact the NFL and NCAA appear to act in tandem or in a symbiotic relationship when it comes to players moving from the NCAA to the NFL.[216] Additional proof of the NCAA and NFL acting in cahoots lies in the fact that collegiate football players are isolated and treated differently under the NCAA bylaws when compared to collegiate baseball, hockey, and now basketball players.[217]

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212. Schoenkopf v. Brown & Williamson Tobacco Corp. 637 F.2d 205 (3d Cir. 1980); Ingram v. Phillips Petroleum Co., 252 F. Supp. 674 (D.N.M. 1966).

213. Levitch v. Columbia Broadcasting System, Inc., 495 F. Supp. 649 (S.D.N.Y. 1980), *aff'd*, 697 F.2d 495 (2d Cir. 1982); *Schoenkopf*, 637 F.2d at 207-08; *Ingram*, 252 F. Supp. at 678.

214. *Schoenkopf*, 637 F.2d at 208; *Levitch*, 495 F. Supp. at 674.

215. Banks v. NCAA, 977 F.2d 1081, 1099 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part) (citing Frederick C. Klein, *College Football: Keeping 'em Barefoot*, WALL ST. J., Sept. 4, 1987, at 15 (speaking of a "decades-long gentleman's agreement between the NFL and the college powers-that-be")), *cert. denied*, 113 S. Ct. 1350 (1993). *See also* Lock, *supra* note 5, at 653.

216. *See* Banks v. NCAA, 746 F. Supp. 850, 861, 861 n. 13 (N.D. Ind. 1990). One commentator has stated:

> In fact, the similarity between NFL and NCAA eligibility rules suggests the possibility of another consideration relevant to antitrust inquiry: collusion. The fact that the NFL's eligibility rules have historically been consistent with the NCAA's rules is either coincidence or, viewed with skepticism, a tacit agreement between two associations that stood to benefit from such an agreement.

Lock, *supra* note 5, at 653. When Braxston Banks entered the NFL draft, he signed the following form required by the NFL.

> I HEREBY IRREVOCABLY RENOUNCE ANY AND ALL REMAINING COLLEGE ELIGIBILITY I MAY HAVE. I WISH TO BE ELIGIBLE FOR THE NFL DRAFT SCHEDULED FOR APRIL 22-23, 1990.

Banks I, 746 F. Supp. at 853.

217. Lock, *supra* note 5, at 651; Note, *Sherman Act Invalidation*, *supra* note 181, at 1310 n.66, 1311; NCAA BYLAWS, *supra* note 13, art. 12.2.4.2.1 (stating that basketball players may now voluntarily enter the NBA draft then, within 30 days after the draft, regain their collegiate eligibility).

In summary, there clearly is a labor market of football players that are eligible to compete on the college gridiron, but also are good enough so that they would have a reasonable chance of making an NFL team. This market is significantly restricted because the collegiate purchaser is cut-off to the collegiate player who enters the NFL draft, i.e., NCAA members will refuse to purchase labor from a player if the player investigates alternatives in the market. Furthermore, the actions and mutual interests of the NCAA and NFL hint of collusion between the two entities. Thus, under section 1 of the Sherman Act collusion to restrain the highly talented collegiate football labor market could be found to exist.

C. Amateurism, Education, and Promotion of Competition

The purpose set forth by the NCAA is to maintain amateurism and prevent professionalization so that alleged educational objectives will not be overshadowed.[218] The courts have been eager to agree with the NCAA's rhetoric that the primary purpose of the no agent and no draft rules is to maintain amateurism, protect educational values, and thereby distinguish collegiate football from its professional counterpart.[219] The NCAA has also expressed the need to protect the student-athlete from the exploitation that can accompany commercialization and professionalism.[220]

These amateurism and educational/student welfare protection arguments backing the no agent and no draft rules are tenuous at best.[221] Barring an athletes ability to compete on the collegiate level simply because he wished to explore his worth in his chosen job market does not preserve amateurism.[222] The no agent and no draft rules do little to promote amateurism or protect educational values, but rather primarily protect the NCAA's economic interests.[223]

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218. *Banks I*, 746 F. Supp. at 860.

219. *Banks II*, 977 F.2d at 1088-94; *Banks I*, 746 F. Supp. at 860-62; Gaines v. NCAA, 746 F Supp. 738, 743-48 (M.D. Tenn. 1990).

220. NCAA CONSTITUTION, *supra* note 9, art. 2.8.

221. Smith, *supra* note 3, at 224-26.

222. Lock, *supra* note 5, at 652.

223. Lock, *supra* note 5, at 645; Smith, *supra* note 3, at 215, 224-26 (raising the hypocritical nature of the NCAA's goal of protecting the student-athlete from exploitation by commercial enterprises when the NCAA is signing billion dollar contracts to televise these same "protected" student-athletes). The revenue generating goal of the NCAA is in direct conflict with the NCAA stated purpose that the "student-athlete[] should be protected from exploitation by professional and commercial enterprises." NCAA CONSTITUTION, *supra* note 9, art. 2.8. *See* Smith, *supra* note 3, at 224-26. When one considers the revenue producing function

Consider the following contradictions with respect to the no draft rule and the amateurism component. The collegiate football player becomes ineligible as soon as he asks to be placed on a draft list.[224] No further action is required for the player to be considered a professional.[225] Baseball players are treated very differently.[226] Unlike the NFL, MLB will draft players at the high school and college levels without the players voluntarily entering the draft.[227] Even if a baseball player is drafted he does not lose his college eligibility.[228] The player can even entertain offers from the professional team that drafted him without losing eligibility, i.e., becoming deemed a professional according to the NCAA.[229] The baseball player is not a professional as defined by the NCAA until he "negotiates"[230] or signs a contract with the team.[231]

A conflict also exists with respect to the way the no draft rule is applied to the NBA as opposed to the NFL.[232] With respect to the NBA, the NCAA has recently enacted a new provision which allows the collegiate basketball player to enter the NBA draft once and regain eligibility to play basketball if the player "declares his or her intention to resume intercollegiate participation within 30 days after the draft."[233] The football player is currently not afforded

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of the NCAA together with the fact that student-athletes are not compensated beyond a possible scholarship, the ironic nature of article 2.8 is abundantly clear — the NCAA should have to, under article 2.8, protect the student-athlete from exploitation from the NCAA as a commercial enterprise. *See id.*

224. NCAA BYLAWS, *supra* note 13, art. 12.2.4.2.

225. Lock, *supra* note 5, at 650. None of the qualities that one thinks of when considering who is a professional are necessary for a football player to lose eligibility. Banks v. NCAA, 746 F. Supp. 850, 862 (N.D. Ind. 1990). *See also* Lock, *supra* note 5, at 650 (stating that a football player does not have to sign a contract or receive compensation to be considered a professional).

226. Lock, *supra* note 5, at 650-51.

227. *Id.* at 651. *See also* Note, *Sherman Act Invalidation*, *supra* note 181, at 1310 n.66. The NHL is similar to MLB in that the NHL will draft players who have not voluntarily entered the draft. *Id.*

228. Lock, *supra* note 5, at 650-51 (describing an example of a player who was drafted while in high school, but turned down the offer to accept a scholarship with the University of Miami Hurricanes).

229. *Id.*

230. In effect, however, the player does have the opportunity to hear additional offers if he declines to accept the first, second, or additional offers. *Id.* at 652. In effect the baseball player is negotiating with the professional team when he declines one offer and hears another. *Id.*

231. *Id.* at 651.

232. NCAA BYLAWS, *supra* note 13, art. 12.2.4.2.1 (providing an exception to the no draft rule for basketball players).

233. *Id. See also Immediately Effective Legislation Published*, NCAA NEWS, Jan. 26, 1994,

this luxury.[234]

The basketball exception actually allows the basketball player to engage himself in many activities that the NCAA ordinarily deems professional conduct.[235] The football player is ineligible at the time he asks the NFL to include his name in the NFL draft.[236] The football player cannot regain his eligibility even if the football player asks to be withdrawn from the NFL draft list *before* the draft occurs.[237] In contrast, the basketball player can enter the NBA draft, get drafted, and still regain collegiate eligibility up to thirty days after the draft.[238] This allows the basketball player, but not the football player, to make an informed decision about whether to leave college early and become a true professional.[239] Also, the basketball player, once drafted, can enter negotiations with the professional team with the aid of his legal guardian or the college's professional sports counseling panel.[240] If a contract to

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at 1-6; Robert C. Berry, *NCAA Rule Changes: NBA Reacts*, SPELBOUND, SPORTS AND ENT. LAW ASS'N (Capital Univ. Law & Graduate Center, Spring 1994). The inferences that can be drawn from the NCAA adopting such a rule for basketball and not for football lends credence to the argument that the NCAA and NFL use the no draft rule in a collusive measure geared to control the labor market for highly talented collegiate football players. *Cf.* Banks v. NCAA, 977 F.2d 1081, 1099-101 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part) (noting the possibility of an agreement between the NCAA and NFL), *cert. denied*, 113 S. Ct. 1350 (1993).

In defense of the NCAA, speculation has been raised that the no draft rule change with respect basketball alone is merely the NCAA's way of testing the concept. Berry, *supra*. In fact Dick Shultz, former Executive Director of the NCAA, apparently wanted to introduce legislation at the 1994 NCAA convention that would in effect allow the football player to return to college after entering a draft if no contract was signed. Brown, *supra* note 183. No such legislation was passed, however, at the 1994 convention. *See generally* NCAA BYLAWS, *supra* note 13, art. 12.2.4. In fact the extension of the basketball exception to football may face a more difficult challenge under the new direction of Cedric Dempsey. Cedric W. Dempsey, NCAA Executive Director, Address at the Seton Hall/Ernst and Young Sport Law Symposium (Apr. 29, 1994); Discussion with Cedric W. Dempsey, NCAA Executive Director, at the Seton Hall/Ernst and Young Sport Law Symposium in New York City (Apr. 29, 1994). Mr. Dempsey was not a supporter of the basketball exception, now NCAA Bylaw article 12.2.4.2.1. Dempsey Address, *supra*; Dempsey Discussion, *supra*. In addition Mr. Dempsey expressed that there does not appear to be a great deal of interest in extending the basketball exception to football. Dempsey Address, *supra*.

234. NCAA BYLAWS, *supra* note 13, art. 12.2.4.

235. *Id.* art. 12.2.4.2.1.

236. *Id.* art. 12.2.4.2.

237. *Id.* art. 12.2.4.2(a).

238. *Id.* art. 12.2.4.2.1.

239. *See id.* art. 12.2.4.2.1; Lock, *supra* note 5, at 651 (discussing how the baseball player, who has enjoyed the same treatment under the NCAA bylaws as the basketball player now does, has greater access to information about his value because he can be drafted and can consider offers).

240. NCAA BYLAWS, *supra* note 13, art. 12.2.4.3. For a discussion of the professional

the players liking does not materialize, the player may still re-enter collegiate basketball within thirty days after the draft.[241]

The question thus looms: Why does a collegiate football player lose his eligibility and a collegiate basketball player remain eligible when they both enter their respective drafts and later wish to return to collegiate competition? Another way to ask substantively the same question: Why is the college football player deemed a professional when a basketball player, engaging in more "non-amateur" activities, is still an amateur according to the NCAA?

Even though the NCAA rules are supposed to be applied equally to all athletes, it is clear this is not the case with the no draft rule as applied to football players on the one hand and baseball, hockey,[242] and recently basketball players on the other hand.[243] As applied, the no draft rule allows baseball, hockey, and basketball players to gather information regarding their market potential.[244] A similarly situated football player, however, cannot gather information about his market worth through the NFL draft without risk of losing eligibility.[245]

While such a discrepancy in the rules as applied is interesting, it is the underlying reasons and inferences that may be drawn that help explain the true forces that drive the NCAA to enforce the no draft rule.[246] The no draft rule, as applied to football players is merely a ploy to encourage players to stay in college and further develop their skills.[247] The reason for this is twofold. First there is the possibility the NFL is influencing the NCAA to maintain such a rule for its benefit.[248] Second, the tremendous financial consideration with respect to football serves as incentive for the NCAA to prevent students from turning professional early.[249] The NCAA

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sports counseling panel, see *infra* note 258.

241. NCAA BYLAWS, *supra* note 13, art. 12.2.4.2.1.

242. *See supra* note 227 (discussing how hockey players are treated similarly to baseball and now basketball players).

243. Lock, *supra* note 5, at 652; NCAA BYLAWS, *supra* note 13, art. 12.2.4.

244. *See* Lock, *supra* note 5, at 652; NCAA BYLAWS, *supra* note 13, art. 12.2.4.

245. Lock, *supra* note 5, at 652.

246. *See id.* at 653.

247. Banks v. NCAA, 977 F.2d 1081, 1095 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part), *cert. denied*, 113 S. Ct. 1350 (1993). *See* Banks v. NCAA, 746 F. Supp. 850, 860 (N.D. Ind. 1990); Lock, *supra* note 5, at 652; Note, *Sherman Act Invalidation*, *supra* note 181, at 1311.

248. *Banks II*, 977 F.2d at 1099-100 (Flaum, J., concurring in part and dissenting in part). *See also* Lock, *supra* note 5, at 653.

249. *See* Lock, *supra* note 5, at 652. *See also* discussion *supra* part IV.A. (discussing the

allows baseball players to be drafted and hear offers because there is no beneficial financial incentive for the NCAA to keep baseball players in school.[250] The reason for this is because collegiate baseball does not produce nearly as much revenue as football.[251] The main conclusion that can be drawn is that the NCAA is less interested in maintaining true amateurism through the no agent and no draft rules, than in the generation and maximization of revenues for its members.[252]

The no agent and no draft rules also do not protect student-athletes' welfare vis-à-vis the protection of education values or the prevention of exploitation from commercial enterprises.[253] It is, to say the least, ironic that the NCAA purports to protect the student-athlete when the NCAA uses the student-athlete to make billions of dollars for the NCAA members.[254] Furthermore, while the no agent and no draft rules may attempt to remove a distraction from the students which could interfere with education, a degree is only a small part of the highly talented student-athlete's overall general welfare.[255] Remember that highly talented student-athletes have the potential to earn millions of dollars playing sports professionally.[256] The no agent and no draft rules maintain highly talented athletes who are uninformed about where they stand with respect to a possibly lucrative professional career in their chosen field.[257]

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commercial nature of the NCAA).

250. *See* Lock, *supra* note 5, at 653 (discussing the argument that the NCAA does not care whether they lose baseball players to the professional leagues because collegiate baseball does not produce very much revenue).

251. *Id.*

252. *Id.* at 652.

253. *See* Smith, *supra* note 3, at 215, 217, 224-26; Lock, *supra* note 5, at 652.

254. Smith, *supra* note 3, at 215, 224-26. *See also supra* note 223 (discussing that the NCAA exploits the student-athlete to the tune of billions of dollars, but then claims the need to protect the student from commercial influences).

255. Lock, *supra* note 5, at 647-48; Smith, *supra* note 3, at 218.

256. *See* Forbes, *supra* note 187 (discussing Marvin Jones's multi-million dollar contract with the New York Jets); Koch, *supra* note 2, at 24 (discussing a multi-million dollar contract Akeem Olajuwan signed in the NBA).

257. Lock, *supra* note 5, at 652. *Cf.* Banks v. NCAA, 746 F. Supp. 850, 853 (N.D. Ind. 1990). When Braxston Banks was trying to determine whether he should enter the NFL draft he contacted the "scouting combines." *Id.* This group told Banks that he was a "rated" player. *Id.* Being a rated player meant that if Banks had used his eligibility he would have been invited to be scouted. *Id.* Banks was also told that he should be drafted. *Id.* The *Banks I* court observed that this contact would not have made Banks ineligible to play collegiate football. *Id.* at 853 n.4. Therefore, in essence, the NCAA is sending the message that the player should seek the advice of an organization which is associated with the NFL without any objective advice from counsel or an agent. *See id.* This appears to be blatantly against the

The no agent rule in effect keeps rule abiding agents out of the picture while rendering the unsuspecting student-athlete a target for unscrupulous agents.[258]

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best interest of the student-Athlete. Ed Garvey and Frank J. Remington, *Universities, Student-Athletes, and Sports Agents: It Is Time For Change*, 67 N.D. L. REV. 197, 211 (1991) (advocating the use of competent professional representatives to advise students who are considering leaving college early and entering the NFL).

258. Garvey & Remington, *supra* note 257, at 210. Garvey and Remington argue that the no agent and no draft rules merely succeed in keeping ethical, competent representatives from assisting student-athletes in making tough decisions. *Id.* With the honest agent out of the picture, the dishonest, unethical agent has an easier time talking the student into making bad decisions which only benefit the agent. *Id.*

The NCAA makes, what appears to be an attempt to protect the student-athlete from the unscrupulous agent. *See* NCAA BYLAWS, *supra* note 13, art. 12.3.4. The NCAA bylaws provide that an institutional professional sports counselling panel may advise the student-athlete with respect to a professional career, review proposed contracts, meet with the student-athlete and representatives of professional teams, contact a professional team to secure a tryout for the athlete, help the student-athlete select an agent, and meet with agents and professional teams to help the athlete determine his or her market value. *Id.* The sports counseling panel bylaw provides that the panel shall consist of at least three persons. *Id.* art. 12.3.4.1. Further, only one of the members can be part of the athletic department staff, the rest being full-time employees of the institution. *Id.* art. 12.3.4.2.

There are several reasons why the career counseling panel will fail to protect the student-athlete. One of the flaws is that it is in the universities best interest to hold onto a professional caliber athlete so the university can reap the financial rewards from the student-athletes' athletic talents. *See* Lock, *supra* note 5, at 652-53; Koch, *supra* note 2, at 24.

Another problem is that a counseling panel will not recognize the desires or ambitions of the student-athlete. *See* Koch, *supra* note 2 at 24; Smith, *supra* note 3, at 218. Regardless of the fact that the student-athlete may have the ability to earn tremendous income playing a sport professionally, *see* Koch *supra* note 2, at 24 (describing Akeem Olajuwan's early departure from the University of Houston for a $6.3 million, six-year contract in the NBA), many people on the sports counseling panel will not be looking out for the athletes' best interest because of their possible preconceived moral notion that an education and degree, at all costs, should be obtained. *See* Banks v. NCAA, 977 F.2d 1081, 1090 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1350 (1993). In short, many academicians on the panel will look at sports at their institution with a demeaning eye when contrasted with the high morals of an education. Smith, *supra* note 3, at 218, 218 nn.25, 26. The *Banks II* majority expressed the opinion that "[they] consider college football players as student-athletes simultaneously pursuing academic degrees that will prepare them to enter the employment market in a non-athletic occupation." *Banks II*, 977 F.2d at 1090. *See also* NCAA CONSTITUTION, *supra* note 9, art. 2.8 (stating that "[student-athletes] participation [in athletics] should be motivated primarily by education and by the physical, mental and social benefits to be derived [from athletics]"). In dealing with a gifted athlete, the sensibility of the *Banks II* majority and the NCAA Constitution's righteous attitude has to be questioned. Why should a gifted student-athlete *primarily* concentrate on education when the opportunity cost of gaining the degree can be outstandingly high for a student-athlete who has the ability to play professional sports, but has eligibility left? *See infra* notes 259-260. This question is especially apropos when the NCAA, which sets forth this education priority concept, has no qualms about making billions off of the student-athletes' athletic talents, and not the student-athletes' academic talents. *See* Justice v. NCAA, 577 F. Supp. 356, 383 (1983) (noting the NCAA's economic goal). *See*

While any genuine goal of the NCAA to protect the educational values of student-athletes is commendable, the problem with the philosophy that highly talented athletes should get an education first is that the player's physical ability to play as a professional is fleeting due to age and possible injury.[259] The ability to gain a degree is less dependent on a person's age and physical athleticism. Furthermore, if the player wants to get a degree he or she can get one whether they pursue the normal four or five year student-athlete program or go on to the professional level and get the degree at a later time when the physical abilities no longer can generate income.[260] If the no draft rule was not so restrictive the student-athlete could determine the compensation he could get in the NFL.[261] If the compensation was sufficient, he could enter the

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also discussion *supra* part IV.A.

An additional problem is that the sports counseling panel will lack people who are familiar with professional athletic negotiations. Garvey & Remington, *supra* note 257, at 212. The argument has been made that the salaries of professional athletes are predictable. *Id.* at 209. However, several first round players who have exceptional skills may be in a position to negotiate high paying contracts that are not predictable. *Id.* It is this athlete that may be harmed by the lack of skill on the part of the panel. Such a student may also suffer if they receive advice to stay in college and forego a high paying contract completely. *See* Koch, *supra* note 2, at 24.

The counseling panel also has a problem in that it will have a difficult time gaining the trust of the student-athlete because of the potential conflict of interests discussed. Garvey & Remington, *supra* note 257, at 212. There are student-athletes who are not interested in school. Lock, *supra* note 5, at 647 (stating that some student-athletes do not desire a degree while others do not have the ability to obtain one). Such a student will not have confidence in a body that advises the athlete to turn down income and stay at the university. *See* Garvey & Remington, *supra* note 257, at 212. Chances are the student will recognize the conflict and not follow the advice of the panel. *Id.* In essence the purpose of the counseling panel is not to protect the student-athlete, but rather, the panel is another way the NCAA supports its economic purpose. *Id.* (stating that the reason student-athletes wouldn't trust the counseling panel is because "university personnel will give priority to the interest of the university and its team and not to the interests of the student-athletes, if the two are in conflict").

259. *See* Lock, *supra* note 5, at 655. Melvin Bratton of the University of Miami Hurricanes was a projected first round NFL draft pick. *Id.* Unfortunately, in the second half of the Orange Bowl, the final game of Bratton's college career, he suffered a severe knee injury. *Id.* Bratton was not drafted until the sixth round in the 1988 draft. *Id.* The injury cost him possibly over $700,000 in signing bonus compensation alone. *See id.*

260. Melvin Bratton could certainly have bought an extensive education with a signing bonus in excess of $700,000 if he so chose to do so when his career was over. *See supra* note 259. One Possible suggestion to better insure that the athlete will have the ability to go back to college at the end of his career, especially if that career is cut short by injury, would be for agents to negotiate with teams for a portion of a contract to be guaranteed and set aside in a restricted trust that could only be released for educational purposes.

261. *See* Banks v. NCAA, 977 F.2d 1081, 1095 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part), *cert. denied*, 113 S. Ct. 1350 (1993); Banks v. NCAA, 746 F.

professional league.[262] With the income earned, the former collegiate player could pursue and pay for an education if they so desire. If the offer from the NFL was insufficient, the player could return to college and pursue his degree using his scholarship.[263] An additional problem with the preconceived value of a degree is that completing one's eligibility by no means can be equated to receiving a degree.[264] Notwithstanding the argument that the NCAA rules aide in keeping students in school and accomplishing an education, there is a compelling argument that keeping the athletes in school does not necessarily develop the skills and tools that the student is supposed to be acquiring.[265]

Although the NCAA claims to have a concern for the student-athlete,[266] some of its policies clearly contradict this basic premise.[267] Generally, the student who is affected by NCAA action is afforded no way to challenge the NCAA action.[268] The student also is in no position to address the problems of the NCAA legislatively because the student is not a member of the NCAA.[269] The student can have no influence on the NCAA, and the university which is in a position to protect the student has an inherent conflict in making access to professional sports easier for the student while the student-athlete has remaining eligibility.[270] This conflict arises because the university will lose the financial benefit it reaps

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Supp. 850, 860-61 (N.D. Ind. 1990).

262. *See* Berry, *supra* note 233.

263. *Id.*

264. *See Banks II*, 977 F.2d at 1092 n.17.

265. Lock, *supra* note 5, at 647.

266. *See* NCAA CONSTITUTION, *supra* note 9, art. 2.8 (stating that the "student-athletes should be protected from exploitation by professional and commercial enterprises"); NCAA BYLAWS, *supra* note 13, art. 12.3.4 (authorizing the university to form a professional sports counseling panel to guide the student-athlete in pursuing a professional sports career).

267. *Cf.* Ponticello, *supra* note 4, at 53 (stating that NCAA concern for the student with respect to institutional hearings is a sham); Smith, *supra* note 3, at 217 (alluding to the inherent conflict between the economic/financial function of the NCAA on the one hand and the educational component on the other).

268. Banks v. NCAA, 746 F. Supp. 850, 855 (N.D. Ind. 1990). After Banks was rendered ineligible he made two requests to the NCAA to restore his eligibility. *Id.* The NCAA refused because it would only entertain requests from the member institution. *Id.*

269. *Id.* NCAA membership does not include coaches and students who the NCAA often claims to be protecting. *Id.*

270. Koch, *supra* note 2, at 24. Tremendous financial benefits accrue to an institution because of a student-athletes' talents. *Id. See supra* note 4 and part IV.A. This serves as an incentive for the university to encourage the student-athlete to complete his eligibility. Koch, *supra* note 2, at 24; Lock, *supra* note 5, at 652.

from the student-athlete's talents.[271] The student is left with no outlet except the courts which, as yet, have been unresponsive.[272]

In order to protect its rules from antitrust attack, the NCAA claims the rules preserve amateurism rather then generate profit.[273] While courts generally agree with this argument,[274] they are obviously closing their eyes to reality.[275] The problem is that the decisions up until this time reflect one common philosophy — deference to the NCAA.[276] Any objective observation without deference to the NCAA would reach a different conclusion.[277] The no agent and no draft rules operate to restrict professional caliber student-athletes from leaving collegiate institutions.[278] The restriction serves to accomplish the NCAA economic agenda.[279] It is selfish for the NCAA to make millions of dollars from the student-athletes playing football, and then turn around and make it more difficult for the student-athlete to make money playing football professionally.[280]

The courts have reasoned that the no agent and no draft rules promote amateurism, protect the educational component of college sports, and are therefore procompetitive.[281] Thus, under the rule of reason, the courts have determined that the procompetitive effects of the no agent and no draft rules outweigh any incidental restraint on the market.[282] When the no agent and no draft rules are scrutinized without deference to this NCAA rhetoric, as discussed above, the foundation supporting the conclusion that the rules are procompetitive is deteriorated.[283] Thus, if the no agent

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271. *See* Koch, *supra* note 2, at 24. Koch argues that such financial implications are the reason the NCAA has traditionally tried to prevent student-athletes from turning professional before their eligibility has expired. *Id.*

272. Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 1350 (1993); Gaines v. NCAA, 746 F. Supp. 738 (M.D. Tenn. 1990); Banks v. NCAA, 746 F. Supp. 850 (N.D. Ind. 1990).

273. *E.g., Gaines,* 746 F.Supp. at 743.

274. *Id.*

275. *Banks II,* 977 F.2d at 1098-99 (Flaum, J., concurring in part and dissenting in part).

276. *Banks II,* 977 F.2d, at 1090-92.

277. Banks v. NCAA, 977 F.2d 1081, 1098-100 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part), *cert. denied,* 113 S. Ct. 1350 (1993).

278. *See supra* part IV.B.

279. *See supra* part IV.A.

280. *See* Lock, *supra* note 652.

281. *Banks II,* 977 F.2d at 1088-94; Banks v. NCAA, 746 F. Supp. 850, 860-62 (N.D. Ind. 1990); Gaines v. NCAA, 746 F. Supp. 738, 745-47 (M.D. Tenn. 1990).

282. *Banks I,* 746 F. Supp. at 860; *Gaines,* 746 F. Supp. at 746-47.

283. *See* Banks v. NCAA, 977 F.2d 1081, 1095, 1099-100 (7th Cir. 1992) (Flaum, J., con-

and no draft rules do not promote amateurism or protect the educational values of collegiate sports, then under the courts reasoning the rules are not procompetitive.[284] If the procompetitive value of the rules is diminished in the eyes of the courts, then under a rule of reason balancing approach, the restraints on the highly talented players may outweigh the procompetitive effects of the rules.[285]

Courts have upheld the no agent and no draft rules based on three primary conclusions: (1) the rules are not commercial in nature; (2) there is no discernible market which is restrained; and (3) any possible restraint is outweighed by the procompetitive effects of the rules.[286] A more realistic view reveals that the no agent and no draft rules are commercial in nature;[287] a discernible market of highly talented players is restrained;[288] and the rules are not procompetitive.[289]

V. CONCLUSION

The no agent and no draft rules, when scrutinized without deference to the NCAA, violate the Sherman Act. The no agent and no draft rules should be changed so that they: (1) more accurately reflect the NCAA goal of preserving amateurism in collegiate sports and (2) enable the student-athlete to gain information and sound advice with respect to their chosen athletic profession.

A. The No Draft Rule

The no draft rule should be changed so that its impact on collegiate athletes is the same regardless of the sport played. It is contradictory to claim that a football player is less of an amateur because he entered the NFL draft whereas the baseball, hockey, or basketball player is afforded full amateur status even if drafted and given offers. Therefore, similar to the rules for a basketball player,

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curring in part and dissenting in part), *cert. denied*, 113 S. Ct. 1350 (1993).

284. *Cf. Banks II*, 977 F.2d at 1088-94; *Banks I*, 746 F. Supp. at 860-62; *Gaines*, 746 F. Supp. at 746 (all stating that the primary purpose of the rules is to promote amateurism and protect the educational nature of college sports, and the rules are therefore procompetitive).

285. *See Banks I*, 746 F. Supp. at 860 (discussing the balancing approach under the rule of reason).

286. *See supra* part III.B.

287. *See supra* part IV.A.

288. *See supra* part IV.B.

289. *See supra* part IV.C.

the NCAA bylaws should allow the football player to enter the draft, evaluate where and if he was drafted, evaluate possible contracts, and finally re-enter collegiate football if the professional option at the time is not sufficiently beneficial.

A player should have the ability to determine if he has the talent level to play at the very lucrative professional level. Closing the athlete out of collegiate sports if he is unsuccessful in being drafted has the effect of restricting the athlete's ability to test his worth in the professional leagues. The talented athlete who is afraid of not being drafted and losing eligibility may lose one or two years of a substantial salary. Since the athlete's abilities do not last very long in general, and in any event may be cut short by injury, one or two years may be a substantial proportion of the total amount the athlete will earn as a professional. Furthermore, if money is managed wisely and the student so desires, the professional salary can provide a degree following or during the athletes playing days.

B. The No Agent Rule

Under the current no agent rule the student-athlete who may have the ability to compete professionally, remains uninformed. If he asks for advice from the NFL or an institution connected with the NFL there is a risk that the athlete will receive advice that best serves the purpose of the NFL rather than the student-athlete. Furthermore, the NCAA member institution cannot advise the student-athlete impartially because the university may have a substantial financial interest in keeping the athlete on the collegiate field. The lack of adequate advice renders the college athlete fair game for the unethical agent who only has his own interest in mind.

An NCAA rule related to agents should allow the student to utilize the services of a reputable, competent agent — perhaps a NCAA approved agent. The function of the professional sports counselling panel should be primarily focused on helping the student-athlete choose a reputable agent — similar to the current article 12.3.4(f). The student-athlete should not be penalized if he agrees to be represented by an agent after hearing the input from the counselling panel. This does not suggest that the student-athlete has to accept the panels recommendation. The ultimate choice should be up to the athlete.

Note that it is too early for the NCAA to totally remove itself

from the agent-student-athlete relationship. The lack of controls and regulations in the sports agency industry makes this a dangerous proposition. The student-athlete should be able to receive competent advice, though, under the watchful eye of the NCAA.

C. Prediction

The NCAA will now be under pressure to change the no draft rule because, in effect, the rule currently only selectively applies to football players. Change will, however, be faced by resistance. Cedric W. Dempsey, the new Executive Director of the NCAA, has stated that he did not support the basketball exception to the no draft rule which allows players to enter the NBA draft yet still regain eligibility. College coaches will also not want their best players, who generate revenues and bowl-invitation records, to have a less restricted path to the professional teams.

Notwithstanding the impediments, the NCAA soon will change the no draft rule to put football players on equal footing with basketball players. The reason for this change is because courts should finally start to see through NCAA rhetoric and observe the actual purpose of the no draft rule, and thereby, may in the future be more likely to find Sherman Act violations.

The no agent rule faces a more difficult challenge because of the rather unpleasant reputation plaguing the agent industry. Any change that comes with respect to the no agent rule will have two characteristics. First, change will come slowly. Second, even if the NCAA allows students with remaining eligibility to be represented by an agent, the NCAA will retain as much control over the relationship as possible. The day may come where the agent of the student-athlete's choice may be part of the professional sports counselling panel at the university. Additionally or alternatively students may be able to consult with NCAA approved agents and still maintain eligibility

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